A

Public Prosecutor v Wong Thean Fah & Anor

B HIGH COURT (KUANTAN) — CRIMINAL CASE NOS MT-45–8 OF 2004 AND 45–9 OF 2004
HELILIAH J
2 OCTOBER 2009

C *Criminal Law — Kidnapping Act (Malaysia) — s 3(1) — Whether case proven beyond reasonable doubt — Failure by defence to rebut prosecution's case on balance of probabilities*

D *Criminal Law — Penal Code — s 302 — Murder — Whether case proven beyond reasonable doubt — Gaps in prosecution's case — Prosecution's attempt to introduce evidence at defence stage disallowed — No evidence on which limb of s 302 relied on by prosecution — Whether prosecution failed to discharge legal burden*

E

Criminal Procedure — Prosecution — Prima facie case — Close of prosecution's case — Charges of murder and kidnapping — Whether offences proven by credible and reliable evidence — Whether statements uttered by accused led to recovery of body of victim and ransom money — Overlap of evidence transpired F *in juxtaposition — Whether prima facie case established for both charges*

Criminal Procedure — Sentence — Kidnapping — Whether previous criminal record factors to be considered

G

Criminal Procedure — Trial — Defence's case — Attempt by prosecution to introduce fresh evidence at defence stage — Whether permissible

H *Evidence — Corroboration — Murder — Whether statements uttered by accused persons led to recovery of body of victim — Whether photographs taken by police admissible as corroborative evidence*

I *Evidence — Information leading to fact discovered — Admissibility of statement — Statements leading to discovery of body of kidnapped victim and ransom money — Whether admissible under s 27 of the Evidence Act 1950 — Conditions necessary for application of s 27 — Whether evidence should have been rejected by trial judge*

The first and second accused were charged under: (i) s 302 of the Penal Code ('Code') read together with s 34 of the same for having murdered a 17 year old kidnap victim; and (ii) s 3 of the Kidnapping Act 1961 read together with s 34 of the Code for kidnapping the victim for a ransom of RM20,000. The kidnap victim ('the deceased') was finally found dead. There were statements made by both the first and second accused in circumstances leading to the body of the victim being found as well as money identified as money paid for the ransom being discovered.

Held, sentencing both accused to life imprisonment and ten lashes of whipping:

(1) The prosecution relied on P19 (the statement) and P20 (the search list). On arrival at the premises in question, which according to SP8 was shown with the guidance of the first accused certain other words were uttered by the first accused which eventually led to the finding of an orange plastic in which part of the ransom money was found (see para 40).

(2) The conditions necessary for the application of s 27 of the Evidence Act 1950 are: (i) the fact of which evidence is sought to be given must be relevant to the issue; (ii) the fact must have been discovered in consequence of some information received from the accused; (iii) the person giving the information must be accused of an offence; (iv) he must be in the custody of a police officer; and (v) the discovery of a fact in consequence of information received from an accused in custody must be deposed to (see para 41).

(3) The exact words uttered by the first accused according to SP9 were 'Ah Bee sudah mati dan kita tanam di pantai. Saya faham itu sebagai orang yang diculik'. Emanating from these words the first accused brought the police party comprising SP9, SP8 and police personnel to a beach. The deceased body was recovered. Hitherto there was nothing in the evidence of SP8 or SP9 to indicate that knowledge had been obtained or procured that the 'missing person' was no longer alive. It could not be inferred that the police could have known then that the deceased was no longer alive. At the time the words were uttered by the first accused to SP9 regarding the deceased, a new offence was being disclosed, that is a person had died and had been buried (see paras 42–48).

(4) P26 constituted a police report made after a body had been recovered apart from the fact that the requirements of s 27 were complied with. The contents of P26 was therefore admissible as evidence. This evidence is corroborated with the evidence of SP4 who positively identified the first accused who purchased a green coloured nylon rope from the

hardware shop where he works. These parts of the evidence provided links of the first accused to a fact of a body being found (see para 51).

(5) The link or common veil was the ransom money recovered and the reliance on the statements uttered by both accused separately to police witnesses. There was an overlap of evidence that suggested that although this was not a case of a single transaction yet the events had transpired in juxtaposition such that they were closely interconnected. Therefore a prima facie case had been established in respect of both the charges (see para 72).

(6) On a balance of probabilities the defence had failed to rebut the prosecution's case on the charge relating to kidnapping and consequently the prosecution had established its case beyond reasonable doubt (see para 92).

(7) A difficult situation emerged during the defence stage, of the prosecution endeavouring to elucidate facts which were not brought forth when the prosecution's witnesses were giving evidence. These caused gaps in the prosecution's case. The general denial of the first and second accused to the 'new' facts attempted to be introduced by the prosecution could not amount to admissions as the first and second accused no longer had the opportunity to cross-examine the prosecution's witnesses. The 'cogent' evidence which the prosecution attempted to introduce at a defence stage was an attempt to fill in a lacuna. The prosecution had not given one jot of evidence to justify which limb of the provision of s 302 it relied on. There was therefore a carte blanc charge under s 302. The cause of death had raised more questions in the light of the attempt by the prosecution to introduce 'fresh evidence'. The questions posed to both accused by the prosecution at the defence stage had entailed troubling questions to surface (see paras 108–109 & 111).

(8) In the light of the attempt to introduce 'fresh' evidence at the stage of the case for the defence it could not be said that the prosecution in respect of the charge pursuant to s 302 of the Code had discharged its legal burden. The statements aside, the conduct of either accused where they had purportedly pointed to the spot (as opposed to the area) could not be taken as corroborative that they had acted in concert to cause the death of the deceased. The court did not take into account photographs taken by the police team showing the first and second accused pointing to the body. The pointing was clearly done on the instructions of the police. The defence had raised a reasonable doubt in respect of the charge under s 302 thereby entitling them to an acquittal (see para 112).

(9) Taking into consideration that both the first and second accused did not have previous criminal records, a sentence of imprisonment for life for each from the date of arrest and ten lashes each of whipping was imposed (see para 115).

[Bahasa Malaysia summary

Tertuduh pertama dan kedua telah dituduh di bawah: (i) s 302 Kanun Keseksaan ('Kanun') dibaca bersama s 34 yang sama atas kesalahan membunuh mangsa culik berumur 17 tahun; dan (ii) s 3 Akta Penculikan 1961 dibaca bersama s 34 Kanun kerana menculik mangsa untuk wang tebusan sebanyak RM20,000. Mangsa culik ('si mati') akhirnya ditemui mati. Kedua-dua tertuduh telah membuat kenyataan-kenyataan yang membawa kepada penemuan mayat mangsa dan juga wang yang dikenalpasti sebagai wang yang telah dibayar untuk wang tebusan yang dijumpai.

Diputuskan, menjatuhkan hukuman penjara seumur hidup dan sepuluh kali sebatan atas kedua-dua tertuduh:

(1) Pihak pendakwaan bergantung kepada P19 (kenyataan) dan P20 (senarai carian). Setiba di premis yang dipersoalkan, yang menurut SP8 telah ditunjukkan dengan panduan tertuduh pertama beberapa perkataan tertentu telah dilafazkan oleh tertuduh pertama yang akhirnya membawa kepada penemuan plastik berwarna oren yang mana sebahagian daripada wang tebusan itu dijumpai (lihat perenggan 40).

(2) Syarat-syarat yang perlu untuk permohonan di bawah s 27 Akta Keterangan 1950 adalah: (i) fakta yang mana keterangan perlu diberikan hendaklah relevan dengan isu; (ii) fakta tersebut hendaklah diperoleh berdasarkan maklumat yang diterima daripada tertuduh; (iii) orang yang memberikan maklumat mestilah dituduh melakukan kesalahan; (iv) dia hendaklah berada dalam jagaan pegawai polis; dan (v) penemuan fakta berdasarkan maklumat yang diterima daripada tertuduh yang berada dalam jagaan hendaklah dideposkan (lihat perenggan 41).

(3) Perkataan-perkataan sebenar yang dilafazkan oleh tertuduh pertama menurut SP9 adalah 'Ah Bee sudah mati dan kita tanam di pantai. Saya faham itu sebagai orang yang diculik'. Berdasarkan perkataan-perkataan berikut tertuduh pertama membawa pasukan polis yang terdiri daripada SP9, SP8 dan penjawat polis ke pantai. Mayat si mati telah ditemui. Sehingga ini tiada apa-apa dalam keterangan SP8 atau SP9 yang menunjukkan bahawa terdapat pengetahuan bahawa 'orang yang hilang' tidak lagi hidup. Tidak boleh dibuat inferens bahawa polis tidak

A mungkin mengetahui tentangnya ketika itu bahawa si mati tidak lagi hidup. Pada masa perkataan-perkataan tersebut dilafazkan oleh tertuduh pertama kepada SP9 berhubung si mati, kesalahan baru didedahkan, bahawa seseorang telah mati dan telah ditanam (lihat perenggan 42–48).

B (4) P26 membentuk laporan polis yang telah dibuat setelah mayat ditemui selain daripada hakikat bahawa keperluan s 27 telah dipatuhi. Kandungan P26 oleh itu boleh diterima sebagai keterangan. Keterangan ini disokong dengan keterangan SP4 yang dengan positif telah mengenalpasti tertuduh pertama yang membeli tali nilon C berwarna hijau dari kedai perkakasan di mana dia bekerja. Bahagian-bahagian keterangan tersebut memberikan kaitan tertuduh pertama dengan fakta mayat yang ditemui (lihat perenggan 51).

(5) Kaitan atau pertaliannya adalah wang tebusan yang dijumpai dan D kebergantungan kepada perkataan-perkataan yang dilafazkan oleh kedua-dua tertuduh secara berasingan kepada saksi-saksi polis. Terdapat pertindihan keterangan yang mencadangkan bahawa meskipun ini bukan kes satu transaksi namun kejadian yang berlaku diatur sebegitu seiring sehingga berkait rapat. Oleh itu kes prima facie telah dibuktikan E berkaitan kedua-dua pertuduhan (lihat perenggan 72).

(6) Atas imbangan kebarangkalian pihak pembelaan telah gagal mematahkan kes pendakwaan untuk pertuduhan berkaitan penculikan dan dengan itu pendakwaan telah membuktikan kesnya melampaui keraguan munasabah (lihat perenggan 92). F

(7) Keadaan sukar timbul di peringkat pembelaan, apabila pendakwaan berusaha untuk menjelaskan fakta yang tidak dikemukakan semasa saksi-saksi pendakwaan memberikan keterangan. Ini telah menyebabkan lompang dalam kes pendakwaan. Penafian biasa tertuduh G pertama dan kedua terhadap fakta-fakta 'baru' yang cuba dikemukakan oleh pendakwaan tidak boleh membentuk kebolehterimaan kerana tertuduh pertama dan kedua tidak lagi mempunyai peluang untuk memeriksa balas saksi-saksi pendakwaan. Keterangan 'meyakinkan' yang cuba dikemukakan oleh pendakwaan di peringkat pembelaan H adalah percubaan untuk memenuhi lompang itu. Pendakwaan tidak memberikan apa-apa keterangan untuk menjustifikasikan cabang peruntukan s 302 yang digunapakai. Sebab kematian telah menimbulkan lebih banyak persoalan dengan percubaan oleh pendakwaan untuk mengemukakan 'keterangan baru'. Persoalan yang I diutarakan kepada kedua-dua tertuduh oleh pendakwaan di peringkat pembelaan telah menimbulkan persoalan-persoalan yang sukar (lihat perenggan 108–109 & 111).

(8) Dalam percubaan untuk mengemukakan keterangan 'baru' di peringkat kes pihak pembelaan, tidak boleh dikatakan bahawa pendakwaan telah berjaya membuktikan pembuktian perundangannya berkaitan dengan pertuduhan di bawah s 302 Kanun. Tanpa mengambilkira pernyataan tersebut, perlakuan kedua-dua tertuduh yang dikatakan telah menunjukkan tempat tersebut (dan bukannya kawasan tersebut) tidak boleh dianggap sebagai menyokong bahawa mereka telah bertindak bersama untuk mengakibatkan kematian si mati. Mahkamah tidak mengambilkira gambar-gambar yang diambil oleh pasukan polis yang menunjukkan tertuduh pertama dan kedua menuding ke arah mayat itu. Perbuatan itu jelas dilakukan atas arahan polis. Pembelaan telah menimbulkan keraguan munasabah berkaitan pertuduhan di bawah s 302 yang melayakkan mereka dibebaskan (lihat perenggan 112).

(9) Dengan mempertimbangkan bahawa kedua-dua tertuduh pertama dan kedua tidak mempunyai rekod jenayah sebelum ini, masing-masing dikenakan hukuman penjara seumur hidup dari tarikh tangkapan dan sepuluh kali sebatan (lihat perenggan 115).]

Notes

For cases on admissibility of statement, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1799–1804.

For cases on corroboration generally, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 841–1006.

For cases on defence's case, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4739–4743.

For cases on prima facie case, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2945–2957.

For cases on s 3(1) of the Kidnapping Act (Malaysia), see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 725–727.

For cases on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1520–1579.

For cases on sentence generally, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3284–4160.

Cases referred to

Amathevelli a/p P Ramasamy v PP [2009] 2 MLJ 367; [2009] 3 CLJ 109, FC (refd)

Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation [1983] 1 NSWLR 1 (refd)

Browne v Dunn (1893) 6 R 67, HL (refd)

Chong Soon Koy v PP [1977] 2 MLJ 78, FC (refd)

Francis Antonysamy v PP [2005] 3 MLJ 389; [2005] 2 CLJ 481, FC (refd)

Husdi v PP [1980] 2 MLJ 80, FC (refd)

Kartar Singh & Anor v Rex [1952] MLJ 85, CA (refd)

A *Krishna Rao a/l Gurumurthi v PP and another appeal* [2009] 3 MLJ 643; [2009] 2 CLJ 603, FC (refd)
Krishna Rao a/l Gurumurthi & Anor v PP & another appeal [2007] 4 CLJ 643, CA (refd)
Lim Chee Lan v PP [1948] MLJ 71, HC (refd)
B *Ng Hoong Kee v PP* [1967] 1 MLJ 85, FC (refd)
PP v Dato' Seri Anwar Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
PP v Liew Kim Choo [1997] 3 SLR 699, HC (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256, HC (refd)
PP v Mohd Farid bin Mohd Sukis & Anor [2002] 3 MLJ 401, HC (not folld)
C *PP v Teh Cheng Poh* [1980] 1 MLJ 251, HC (refd)
PP v Yap Kok Meng [1974] 1 MLJ 108, HC (refd)
Reid v Kerr [1974] 9 SASR 367 (refd)
R v Burdett (1820) 4 B & Ald 95 (refd)
Sia Soon Suan v PP [1966] 1 MLJ 116, FC (refd)
D *Tan Chuan Ten & Anor v PP* [1997] 2 SLR 348, CA (refd)
Tan Too Kia v PP [1980] 2 MLJ 187, FC (folld)

Legislation referred to

Anti-Corruptions Act 1992
E Criminal Procedure Code ss 113, 180, 425
Dangerous Drugs Act 1952
Evidence Act 1950 ss 27, 137, 138, 157
Internal Security Act 1960
Kidnapping Act 1961 ss 3, 16
F Penal Code ss 34, 302

Ahmad Rosli Sham (Razali Che Ani and Kalmizah Salleh with him) (Deputy Public Prosecutors, Attorney General's Chambers) for the prosecution.
Vigneswaran Raju (The Chambers of Waran) for the first accused.
Bob S Arumugam (Bob S Arumugam & Co) for the second accused.

G

Heliliah J (now FCJ):

[1] The two charges preferred against Wong Thean Fah ('the first accused')
H and Chan Yoon Choy ('the second accused') are as follows:

(1) BAHAWA KAMU, WONG THEAN FAH, KPT: 721103-10-6183 BERSAMA DENGAN CHAN YOON CHOY, KPT: 760827-08-5973 PADA JAM LEBIH KURANG 2 PAGI 28 APRIL
I 2004, BERTEMPAT DI PANTAI TERUNTUM, DI DALAM DAERAH KUANTAN, DI DALAM NEGERI PAHANG DARUL MAKMUR, TELAH MELAKUKAN PEMBUNUHAN KE ATAS WOO CHEN CHEW, KPT: 870421-23-5115, BERUMUR 17 TAHUN, MAKA KAMU DENGAN INI TELAH MELAKUKAN

SUATU KESALAHAN YANG BOLEH DIHUKUM DI BAWAH SEKSYEN 302 KANUN KESEKSAAN DAN DIBACA BERSAMA SEKSYEN 34 KANUN KESEKSAAN.

(2) BAHAWA KAMU BERSAMA-SAMA PADA JAM LEBIH KURANG 9 MALAM PADA TARIKH 27 APRIL 2004 BERTEMPAT DI PANTAI TERUNTUM, DI DALAM DAERAH KUANTAN, DI DALAM NEGERI PAHANG DARUL MAKMUR, DALAM MELAKSANAKAN NIAT BERSAMA KAMU TELAH MENCULIK WOO CHEN CHEW, KPT: 870421-23-5115, UNTUK MENDAPATKAN WANG TEBUSAN SEBANYAK RM20,000 DENGAN CARA MENGHALANG SECARA TIDAK SAH, OLEH YANG DEMIKIAN, KAMU TELAH MELAKUKAN SUATU KESALAHAN DI BAWAH SEKSYEN 3 AKTA PENCULIKAN 1961 (AKTA 365) DIBACA BERSAMA SEKSYEN 34 KANUN KESEKSAAN.

[2] Section 3 of the Kidnapping Act 1961 (or Act 365) stipulates:

3 Whoever, with intent to hold any person for ransom, abducts or wrongfully confines or wrongfully restrains such person shall be guilty of an offence and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, also be liable to whipping.

[3] Section 302 of the Penal Code provides:

302 Whoever commits murder shall be punished with death.

[4] Two charges are brought against the first and second accused with s 34 of the Penal Code indicating the common veil between the first and second accused. The nature of the offences are such that the prosecution's case as unfolded during the course of the trial overlap, since the kidnapped victim ('the deceased') was finally found dead. At the conclusion of the prosecution's case it is borne out that the evidence is largely circumstantial. The prosecution's case has been challenged as there are statements made by both the first and second accused in circumstances leading to the body of the victim being found as well money identified as money paid for the ransom being discovered.

THE PROSECUTION'S CASE

[5] The narrative part of the prosecution's case unfolds with the evidence of SP1 the mother of the deceased (Woo Chen Chew nicknamed as 'Ah Bee'). According to her evidence her son Ah Bee left home at about 9pm on 27

A April 2004 and failed to return home. The following day on 28 April 2004 a call was received from a number identified as Ah Bee's mobile number that is 016-9537893. The caller apparently spoke in Bahasa Malaysia but according to SP1 the accent was Indonesian. The words uttered to SP1 were 'Anak awak ada kena ikat. Saya mahu 20,000'. A short conversation ensued B where the caller persisted on the amount. Half an hour later another call was received and again a conversation ensued on the amount of money demanded and allegedly the amount of RM10,000 was agreed upon. SP1 then communicated with a brother in Kuala Lumpur identified as Tee Say Fung. At about 10pm SP1 lodged a report, P5. On 29 April 2004 at about 3pm SP1 C received a call from the same number inquiring about the money. SP1 testified that the money was received at the Police Department Kuantan at about 4pm on 29 April 2004 after photostat copies had been taken. SP1 received another call where she was instructed to wait at a Petronas station situated at Jalan Air Putih. The money was wrapped in a newspaper. However D after 15 minutes no one appeared. Instead she saw someone who was proceeding slowly on a motorcycle. SP1 subsequently received another phone call when she was instructed once again to proceed to the previous Petronas station. This time having waited there, another call was received when she was instructed to proceed to Jalan Air Putih where a video entertainment E centre was located. She was also instructed to place the money in a toilet in the centre. The money was placed in the toilet as instructed. According to SP1 Ah Bee never returned. On 5 May 2004 SP1 received a phone call from the police and was informed that Ah Bee was at the hospital to be identified. Ah Bee (deceased) was identified by scars on his stomach and left hand. A set F of keys ID6 was also identified.

[6] SP3, the brother of SP1, confirmed that his sister borrowed money from Tee Say Fung in the amount of RM10,000 which he brought to Kuantan about 11pm on 28 April 2004. SP3 identified one Chief Inspector G William as the person who made photostat copies of the money in his presence. There were 100 pieces of RM100. According to SP1 it was acting upon the instructions of the caller that the money was wrapped in a newspaper.

H **[7]** SP4 is a shop assistant of a hardware shop situate at Syarikat Perkakas Besi Indah Sdn Bhd, Jalan Beserah. On 26 April 2004 between 5.30pm and 6.30pm a person whom he identified positively as the first accused, came to the shop to purchase a nylon rope about 5–6mm in length and the weight was about 20–30g. The said hardware shop retailed only the green coloured I nylon rope that was purchased by the first accused. According to SP4 the nylon rope would normally be used as a clothes line.

[8] SP5 works at Century Communication, Jalan Telok Sisek, a shop that sells, inter alia, cell phones and related accessories such as SIM cards and prepaid cards. SP5 gave evidence that on a date he could not recall, the second accused was at the shop to purchase a prepaid card for the value of RM100. About five days after that police personnel went to the shop and made an examination of RM100 notes that were in his possession. He had given ten pieces of the RM100. One piece was taken in respect of which a receipt was given.

[9] SP6 is the proprietor of a pawnshop (Wah Meng). According to him on 13 April 2004 the second accused had pawned a gold chain for the amount of RM600 and a receipt was issued with his name and identity card number written on the receipt. On 30 April 2004 the second accused himself returned to redeem the pawned gold chain with the payment of RM600. The second accused was subsequently brought by an ASP (SP7) to both the pawnshop and the shop retailing cell phones. From the pawnshop a receipt (P10) was obtained and from the shop selling cell phones a RM100 note bearing the serial number AU 7875015 was retrieved. This was one piece of the 100 pieces of the ransom note. P11 indicates that the date it was taken is 4 May 2004.

[10] On 29 April 2004 SP15 an Assistant Superintendant of Police with the police district headquarters in Kuantan, on the instruction of DSP Krishnan Nair, was tasked to conduct a surveillance of the premises identified as Pusat Perhiburan Keluarga Nurbaya, Air Putih Kuantan. With him was one L/Corporal Rohaizad. The observation of the premises was conducted between 5pm and 6pm. It was noted that during that time there was parked in front of the premises a blue Suzuki RD Sport motorcycle bearing the registration No JDL 7444. In the course of observing he saw a tall thin male Chinese emerging scrurrying out (tergesa-gesa) carrying a package wrapped in newspaper. He could not identify the male Chinese who left the scene hurriedly on the motorcycle JDL 7444. According to SP15 he was aware that the surveillance was mounted on account of an investigation relating to a kidnapping of a Chinese and the question of ransom. At the time of the observation SP15 was also seated on a motorcycle. At the time he saw the male Chinese, he was about 10–13 feet away. SP15 also described that the male Chinese as behaving suspiciously. Upon cross-examination by counsel for the first accused, he clarified that he was also instructed not to effect any arrest or to tail any person suspected. This was further explained that no arrest was to be made to preclude the possibility that it would pose a threat to the life of the victim then.

[11] On 4 May 2004 at about 1am in the morning, SP16 acting on instructions and certain information received, proceeded to a restaurant at

Jalan Beserah with a team of three other police personnel. At the vicinity of the restaurant surveillance was made which was focused on motorcycle bearing the registration No JDL 7444. Upon seeing two male Chinese SP16 and his team went up to the two male Chinese and identified themselves as police officers by displaying the authority cards. The two male Chinese were arrested. A physical search was conducted on one of them who had voluntarily given his name as his identity card was not in his physical possession. Found in his possession however was a SIM card and some cash. The report of the arrest is found in Kuantan Report 6698/04 (P30). The other male arrested is identified as Shim Chee Kang. The motorcycle was confiscated acting on information that it was being used by a suspect in connection with the kidnapping report P5. According to SP16, the two had attempted to take flight. Shim Chee Kang (SP14), the other male Chinese arrested by SP16 and his team gave evidence, inter alia, that he knows the first accused (identified as Ah Kit) since 2002. According to SP14 the motorcycle registration number JDL 7444 is owned by his father. This is confirmed by SP13 Shim Tuck Hui the father. SP14 also stated that sometime in April 2004 the motorcycle was borrowed by the first accused for a period that he could not recall but said that it was about ten days. The motorcycle was returned to him about 7pm sometime in April 2004 the exact date of which he could not recall. On 4 May 2004 he was then at Restaurant T&C and he was joined by the first accused.

[12] SP10 is the investigating officer where he was working in Kuantan then. His evidence indicated that he received RM10,000 in 100 Malaysia Ringgit notes. He made the photostat copies of the money in a list, P9. There were five copies of the list made. He also admitted that there were arrests made of two male Chinese. There were also received a SIM card, a motorcycle JDL 7444 with a handphone belonging to one Shim Chee Kang SP14. A police report was received from one CI Nasarudeen, SP16. On the same date that is 4 May 2004 at about 6am he also received 29 pieces of RM100, another handphone and a SIM card. The same witness also received from SP7 a gold chain, a note from the pawn shop earlier described. On 4 May 2004 at about 11.30pm SP10 received from SP8 48 pieces of RM100 note. The notes were contained in an orange plastic bag (P23) and the notes were marked as exh 24 (1–48).

[13] On 5 May 2004 SP10 was in Hospital Tengku Ampuan Afzan where the deceased Woo Chen Chew was identified by his mother and sister.

[14] SP10 in cross-examination was also made to explain the way in which investigations were conducted. In his evidence he explained that he was assigned the task of investigating officer by DSP Wan Sham Wan Salleh. The operation was code named 'Ops Scorpion'.

[15] SP10 is the person who interviewed the mother of the accused. His evidence established DSP Krishnan (SP8), ASP Koh Ah Tiam (SP9), ASP Mohd Noor (SP15), Chief Inspector Khairul Nasarudeen (SP16) as part of the police team. SP10 is the investigating officer for the kidnapping. SP10 confirmed receiving money to the amount RM10,000 as explained by SP3.

[16] Two witnesses for the prosecution gave evidence regarding the arrests of the accused persons. SP8 from the commercial crimes investigation at the material time was in charge of serious offences in the Pahang contingent. He was also then the general commander to the task force designated as 'Ops Galing' formed consequential upon the Kuantan Police Headquarters receiving the report of the kidnapping for ransom P5. His evidence included the following:

> *3.05.04* — 2345 hours bertindak atas satu maklumat saya dan pasukan D9 IPK Pahang terdiri daripada CI Nasruddin ...

[17] According to him at that material time he and his team members proceeded to Restaurant Good Park Kopitiam Millennium, Medan Selera Kuantan, Jalan Telok Sisek Kuantan. His evidence continued as follows:

> Di sana buat seketika saya dan pasukan membuat pemantauan dan mengenalpasti seorang suspek.
>
> Saya menghampiri beliau dan memperkenalkan diri sebagai polis dan meminta beliau menunjuk kad pengenalannya.
>
> Apabila saya sahkan maklumat yang diberi itu, ialah orangnya, saya mengarahkan D/LKpl Tamil untuk menggari beliau. Nama suspek ialah Chan Yoon Choy — OKT 2 dicamkan.
>
> Berlaku pergelutan kerana suspek cuba 'resist' arrest tetapi beliau berjaya digarikan. Pemeriksaan badan dibuat. Di hadapan poket seluar dijumpai 29 keping note RM100.00 dan di bahagian belakang poket seluar dijumpai sebuah handphone Nokia. Kedua-duanya dirampas dan membawa suspek ke Ibu Pejabat Polis Kuantan.
>
> IPD Kuantan, saya membuat semakan 29 keping note 100 dan salinan photostat wang yang dijadikan wang tebusan. Dari semakan didapati semua 29 keping note RM100 itu sama dengan sebahagian senarai yang diberikan kepada saya.

[18] This evidence however relates only to the circumstances under which the second accused was arrested. The further evidence of SP8 is met with an objection by counsel for the first accused and it is as follows:

> Pada 4.05.04 jam 4.20 petang saya berada di IPD Kuantan bersama seorang suspek lagi bernama Wong Thean Fah, dicamkan OKT 1.
>
> Pada masa itu saya menemuramah beliau dan dalam perbualan dimaklumkan bahawa wang ada disimpan dalam bilik air di bilik sewanya.

A Vignesh

Membantah on the Voluntary of Statement based on s 27 Evidence Act.

DPP

Perlu penghujahan kepada s 27 pada masa ini mengelirukan — authority yang berbeza.

B

[19] At that stage the submissions focused on the decision of the Federal Court in *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389; [2005] 2 CLJ 481. Counsel for the first accused submitted that s 27 of the Evidence C Act 1950 is capable of being abused by the police and hence courts should be vigilant about the circumvention of its provisions (*Public Prosecutor v Mohd Farid bin Mohd Sukis* [2002] 3 MLJ 401). The submission of counsel for the first accused which is also adopted by counsel for and on behalf of the second accused is encapsulated in certain passages in *Mohd Farid*'s case (pp 83–85). D It is found unnecessary to set forth those passages as *Mohd Farid*'s and other cases pertinent to the same issue on the application of s 27 of Act 1950 were revisited in *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389. In the trial before me the prosecution is objecting to the alleged confession being referred to where both counsel for the defence maintained that the issue of E voluntariness govern the discretion to be exercised. It is therefore incumbent to refer to certain passages in *Francis Antonysamy*'s case in extenso as follows:

(b) The admissibility of the information supplied by the accused under s 27

F

Learned counsel conceded that no objection was taken during the trial to the admissibility of the information supplied by the accused to the police under s 27. However, he said that notwithstanding the fact that they were admitted without objection by the defence the fact remains that the information supplied is involuntary and on the authority of *Md Desa bin Hashim v Public Prosecutor* G [1995] 3 MLJ 350; [1995] 4 CLJ 677 and *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507; [1999] 1 CLJ 829 they are inadmissible; and inadmissible evidence remains inadmissible. He added that in order for evidence to be admissible under s 27 there must also be compliance with s 112(2), (3) and (4) of the Criminal Procedure Code ('s 112') which read as follows:

H

(2) Such person shall be bound to answer all questions relating to such case put to him by that officer:

Provided that such person may refuse to answer any question the answer to which would have a tendency to expose him to a criminal I charge or penalty of forfeiture.

(3) A person making a statement under this section shall be legally bound to state the truth, whether or not such statement is made wholly or partly in answer to questions.

(4) A police officer examining a person under subsection (1) shall first inform that person of the provisions of subsections (2) and (3).

In support he referred to *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507; [1999] 1 CLJ 829 where Chong Siew Fai CJ (Sabah and Sarawak) said at p 855:

> Moreover, admitting the appellant's s 27 information would infringe the principle of the right against self-incrimination, there being no evidence of s 112(2), (3) and (4) of the Criminal Procedure Code having been complied with.
>
> In short, since the learned trial judge in the instant case under appeal had found that the s 27 information of the appellant was not voluntarily made, it is irrelevant. It was not the appellant's own statement and was extracted from him in contravention of the privilege against self-incrimination and would be unfair to have it admitted against him. The facts and circumstances of the case show that the s 27 information obtained has an adverse effect on the fairness of the proceedings so that the learned trial judge ought not to have admitted it.

Learned counsel's objection is thus centred on the need for the requirements of the privilege against self-incrimination being complied with in order to render admissible information supplied under s 27.

It must be observed that the privilege against self-incrimination can be expressly or impliedly abrogated by statute. In commenting on the implied abrogation of the privilege the *Law of Privilege* by McNicol says at p 257:

> More and more often it will be seen that the courts seem to be finding that the very object of the statute would be frustrated if the privilege were to apply (*Police Service Board v Morris* (1985) 58 ALR 1; *Stergis v Federal Commissioner of Taxation* (1989) 89 ATC 4442 at pp 4455–7; *Commissioners of Customs and Excise v Ingram* [1948] 1 All ER 927 at p 929). This is not to deny that the very object of the statute would not be frustrated. Rather it is simply worth noting that the frustration of statutes appears to have become the yardstick for determining whether there is a clear manifestation of a legislative intention to abrogate the privilege by necessary implication.

There are various ways in which the privilege against self-incrimination is preserved by law. They include, inter alia, the right of a person not to answer any questions as provided by s 112(2), the need for the administration of the caution under s 113 and the entrenched rationale of the voluntariness rule as contained in s 24 of the Evidence Act 1950 ('s 24'). In commenting on the relationship between the latter rule and the privilege against self-incrimination the *Law of Privilege* by McNicol says at p 288:

> It is argued elsewhere by the present author that the privilege against self-incrimination is the most appropriate explanation of the voluntariness rule. In brief, it is argued that the 'pressure' or 'compulsion' aspect of the privilege against self-incrimination is closely allied to the 'inducement' or

'oppression' required for the voluntariness test. When a court asks whether a confession is voluntary, it is asking whether there has been any pressure on the accused to incriminate her or himself. If a court holds a confession 'involuntary' it is stating that there has been either an inducement or oppressive conduct (or force) which caused the accused to confess. In other words, there has been sufficient pressure or compulsion for the privilege against self-incrimination to have been breached.

The object of the voluntariness rule in s 24 is therefore to preserve the privilege. The resultant critical issue for determination is whether this privilege also extends to s 27. If this privilege is to be read as a part of s 27 the information supplied under the section must, in the first place, be also subject to the voluntariness rule in s 24. If it is not so subjected s 27 will not be governed by the privilege. It has been established by a long line of authorities that s 27 is independent and is not subject to the voluntariness rule in s 24. See for example, *Lee Kok Eng v Public Prosecutor* [1976] 2 MLJ 125; *Chong Soon Koy v Public Prosecutor* [1977] 2 MLJ 78; *Chandrasekaran & Ors v Public Prosecutor* [1971] 1 MLJ 153 and *Wai Chan Leong v Public Prosecutor* [1989] 3 MLJ 356; [1989] 2 CLJ 1168; [1989] 1 CLJ (Rep) 171. Then came *Md Desa bin Hashim v Public Prosecutor* [1995] 3 MLJ 350; [1995] 4 CLJ 677 where it was ruled that in order for information supplied under s 27 to be admissible it must be voluntary. The law was re-instated to its rightful position in *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507; [1999] 1 CLJ 829. In our opinion it is illogical to suggest that s 27 is subject to the voluntariness rule in s 24. If that were to be so the desired evidence can be admitted under s 24 without there being any need for s 27. The fact that s 27 has been specifically enacted is therefore a clear indication that it has a purpose of its own to serve. As it applies only to a restricted and specified type of evidence as opposed to s 24 it can only mean that it is an independent provision which is unaffected by s 24, or, for that matter, any other statutory provision regulating the manner of taking or recording statements from any person. This is illustrated by the established rule that information relating to facts discovered in consequence of a confession rendered inadmissible by reason of being involuntary is still admissible under s 27 (see *R v Warickshall* (1783) 1 Leach 263; *R v Lockhart* (1785) 1 Leach 386). Thus the existence of s 27 on its own without being affected by ss 24, 113 and 37A of the Dangerous Drugs Act 1952 was correctly recognised by this court in *Wai Chan Leong v Public Prosecutor* [1989] 3 MLJ 356; [1989] 2 CLJ 1168; [1989] 1 CLJ (Rep) 171. That would also be the inevitable result of the relationship between s 112 and s 27. The corollary is that s 27 is not subject to the voluntariness rule or any other prescribed mode of recording statements. Even the passage from *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507; [1999] 1 CLJ 829 referred to by learned counsel does not support the stand taken by him. This court referred to s 112 in that case not as a condition of admissibility of information under s 27 but as a ground for excluding such evidence in the exercise of the discretion of the court. Both are different concepts. Since voluntariness is not a condition of admissibility of information supplied under s 27 the privilege against self-incrimination which is manifested in an involuntary statement or in a statement made in breach of the requirements of s 112 must be deemed to have been impliedly abrogated insofar as s 27 is concerned. It follows that the argument of learned counsel that s 27 is

subject to the voluntariness rule in s 24 and the privilege against self-incrimination in s 112 cannot be sustained. A

We agree with *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507; [1999] 1 CLJ 829 that information supplied under s 27 which has been found to be involuntary may be excluded by the court in the exercise of its discretion. As the exclusion of the evidence is discretionary the *exercise of the discretion depends on the facts* of each case. This was explained by the High Court in *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401 at pp 413–415: B

> In making a ruling on the evidence adduced by both parties, it is first necessary to determine whether *Goi Ching Ang v Public Prosecutor*, where a s 27 statement was excluded on the ground that it was involuntarily supplied, must be taken to mean that such statements must be excluded in all cases of involuntariness. In resolving the problem that I have posed, it must be remembered that the exclusion of evidence in the circumstances now under deliberation is a matter of discretion. *The exercise of a discretion cannot be fettered by laying down rules and regulations*. If that is so, it will become a rule of law and cease to be an exercise of discretion. This has been stressed in a plethora of local cases. I consider it sufficient to refer to *Public Prosecutor v Sundaravelu* [1967] 1 MLJ 79 where Raja Azlan Shah J (as His Highness then was) said at pp 79–80: C D E
>
> > This application brings into review the provisions of s 310 of the Criminal Procedure Code (Cap 6). It is clear from the provisions of that section that this court has a discretion whether or not to allow the application, but to my mind, emphasis is laid on the phrase 'in order that substantial justice may be done in the matter'. I think the provisions of this section have been well gone into by the Court of Appeal in *Veerasingam*'s case [1958] MLJ 76. There it was said that the section is one of discretion and no hard and fast rules can be laid down, otherwise it ceases to be a discretion and becomes a rule of law. F

As I said in *Liow Tow Thong & Ors v Pentadbir Tanah Alor Gajah & Ors* [1998] 1 MLJ 79 at p 86: G

> It is a principle of long standing that a body charged with exercising discretion in the making of decisions must not, by its own act or decision, prevent itself from exercising that discretion properly (see *R v Sevenoaks DC, ex p Terry* [1985] 3 All ER 226). H

Evidence cannot therefore be excluded in the exercise of the court's discretion by the automatic application of a predetermined set of rules. In so saying, I find support in *R v Chalkley and another appeal* [1998] 2 All ER 155 where Auld LJ, in dealing with the admissibility of evidence under s 78 of the Police and Criminal Evidence Act 1984 on the ground of unfairness, said at pp 177–178: I

> We also say here, though it is strictly more relevant to Mr Cassel's submission about the balancing exercise undertaken by the judge, that we reject as contrary to the wording of s 78 and the authorities that any conduct which

A may be typified as 'oppressive' automatically requires exclusion of evidence obtained thereby. Just as the labelling of conduct as unlawful does not necessarily affect its character for the purpose, nor does the application to it of the epithet 'oppressive' automatically override the fundamental test of fairness in admission of evidence. Oppressive conduct, depending on its degree and/or its actual or possible effect, may or may not affect the fairness of admitting particular evidence.

In this regard, I also refer to *McDermott v The King* (1948) 76 CLR 501 where Dixon J said at p 513:

C In referring the decision of the question whether a confessional statement should be rejected at the discretion of the judge, all that seems to be intended is that he should form a judgment upon the propriety of the means by which the statement was obtained by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused.

D

In commenting on limits that may be set in the exercise of the discretion to exclude evidence Latham CJ, Mc Tierman, Webb and Fullagar JJ said in *R v Lee* (1950) 82 CLR 133 at p 151:

E What is impropriety in police methods and what would be unfairness in admitting in evidence against an accused person a statement obtained by improper methods must depend upon the circumstances of each particular case, and no attempt should be made to define and thereby to limit the extent or the application of these conceptions.

F

It follows that *Goi Ching Ang v Public Prosecutor* cannot be understood to mean that a s 27 statement must be excluded in all instances where it was supplied involuntarily. Neither does that case profess to lay down such a rule. It was made clear by the Federal Court that it was considering the exclusion of the s 27 statement 'On the fact of this case ...' (at p 524) and as stated at p 527:

G

... The facts and circumstances of the case show that the *s 27 information obtained has an adverse effect on the fairness of the proceedings so that the learned trial judge* ought not to have admitted it.

H Therefore, the Federal Court excluded the s 27 statement on the facts of that case. The rule is therefore not of universal application. It depends on the facts of each case. Thus the ratio that can be gleaned from *Goi Ching Ang v Public Prosecutor* is that a court, in considering the exclusion of a s 27 statement on the ground of involuntariness, must take into account the facts of the case and the degree of force used. In my opinion, the degree of involuntariness that can be

I said to be sufficient to exclude a s 27 statement in the exercise of the discretion of the court must be balanced against the fact that involuntariness is not a condition of admissibility of such a statement. Therefore the circumstances of involuntariness must indeed be extraordinary in order to exclude a statement on a ground which, in the first place, does not affect its admissibility in law. In this

case, the defence's evidence is that the first accused supplied the information after the police had greed not to take any action against the second accused and his wife.

The party that is seeking to have evidence excluded in the exercise of the discretion of the court has the onus of showing, on the balance of probabilities, that the discretion should be exercised in its favour. In this regard reference may be made again to the judgment of the High Court in *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401 at pp 412–413:

> The Australian courts have held that the party seeking to have evidence ruled inadmissible in the exercise of the discretion of the court has the onus of showing, on the balance of probabilities, that the discretion should be exercised in that way (see *R v Lee* (1950) 82 CLR 133; *Wendo v R* (1964) 109 CLR 559; *Cleland v R* (1982) 151 CLR 1; *Van Der Meer v R* (1988) 62 ALJR 656). As Kerry Stephens says in his book entitled *Voir Dire Law* at p 58:
>
> > It follows that the party seeking the exclusion of the evidence must satisfy the court that the circumstances are such that the court should exercise its discretion in favour of the party making the application.
>
> The appropriate way of dealing with an application of this nature is by way of a trial within a trial (see *Smith v R* (1957) 97 CLR 100; *R v Bradshaw* (1978) 18 SASR 83; *R v Rowley* (1986) 23 A Crim R 371). However, in *R v Dugan* [1984] 2 NSWLR 554, Street CJ expressed the view that a judge, in considering an application of this nature, ... must necessarily act upon such evidence as is placed before him either in the substantive trial or on the voir dire, or both' (at p 559). In my opinion, the holding of a trial within a trial is a more appropriate method to be followed. In support, I refer to Kerry Stephens where he says at p 7:
>
> > ... if the voir dire procedure is not adopted, a defendant is placed at a disadvantage because the impugned statement will not be excluded unless evidence arising during the prosecution case warrants that action. When a voir dire is not conducted, an accused is placed in a situation where he or she can only give evidence during the substantive trial .... The result obviously places an accused at a serious disadvantage because had the admissibility of the statement been determined during the prosecution case it may not have been necessary for the defendant to give evidence during the trial proper.
>
> The holding of a trial within a trial for the purpose under discussion will ensure that all relevant matters to facilitate the making of a ruling are addressed. If such a course is not followed, material evidence may be overlooked as the issue will not be in focus. This will place the defence at a disadvantage. Needless to say, the evidence in dispute can be excluded based even on material available in the substantive trial itself on the issue.

What therefore remains for consideration is whether the High Court ought to have excluded the information supplied by the accused under s 27 in the exercise of its discretion. As stated earlier the burden of proof on this issue is on the defence. The

A very evidence that is now being objected to was admitted by the High Court without any objection from the defence. The police officer to whom the information was supplied was not cross-examined on this issue when he gave evidence. In the circumstances the evidence of the accused that he did not supply the information in question has very little value with the result that there is
B insufficient material before the court to exercise the discretion in favour of the accused.

(Emphasis added.)

C **[20]** It is to be observed that in *Francis Antonysamy*'s case the defence had not raised an objection while in the case before me an objection is being raised.

[21] After hearing submissions I ruled that the objections raised by defence
D counsel at that stage is premature as it would render automatic that the moment objections were raised then a trial within a trial must be held. It is found that at that stage it would be premature to determine that a trial within a trial must be held. The prosecution did not apply to admit a cautioned statement in its entirety. Instead what is sought to be admitted is a portion
E of a statement made by the accused in the course of questioning him.

[22] The evidence given by SP8 was then allowed to be resumed. The relevant portions are produced verbatim:

F Pada tarikh dahulu pada 4.05.04 jam 4.20 seorang banduan ditemuramah. Pada tarikh itu OKT 1 memaklumkan kepada saya bahawa wang ada tersimpan di bilik air di bilik sewa dia.

Pada ketika itu kami baru balik daripada tepi pantai. Bersama saya ialah Insp. Mohd Noor, Lance Copl Mohamad dan Lance Cpl Mohd Noor.

G Ketika itu saya di bilik Crime Prevention Unit IPD. Selepas menerima maklumat seperti yang dikatakan ada catatan dibuat. Saya membuat laporan polis mengenai maklumat yang diterima tadi.

Laporan Polis *6738/04 dirujuk dan disahkan: P19.*

H Tindakan seterusnya: Suspek membawa kami ke rumahnya di No. 36 Lorong Air Putih Satu. Apabila sampai di sana saya naik ke rumah dan naik ke tingkat satu di tempat ia menyewa. Kemudian ia membawa saya ke bilik air dan menunjukkan sebuah plastik orange yang terikat di bawah 'sinki' (wash basin).

Ia tunjuk dengan jari dan mengatakan kepada saya 'wang ada dalam plastik itu'. Seterusnya saya mengambil plastik itu dan membuka dan didapati adanya 48
I keping wang note RM100.

Bersama saya ada salinan photostate nombor siri wang tebusan dan saya bandingkan 48 keping ini dengan wang yang ada dalam salinan Photostat itu. Selepas semakan dibuat didapati semua ada terkandung dengan salinan yang saya bandingkan.

Saya telahpun siapkan senarai pemeriksaan dan serahkan kepada suspek untuk ditandatangani. Senarai pemeriksaan dikemukakan dan dirujuk.

Senarai pemeriksaan identified but without the Lampiran 'A' attached. Lampiran 'A' is referred therein.

Kemudian saya dan pasukan dan suspek balik ke IPD Kuantan dan membuat satu laporan polis. Laporan Polis 6739/04: P21.

Barang-barang kes diserahkan kepada Insp William. Borang penyerahan barang kes dikemukakan: P22.

Plastik orange dan wang 100 (48 keping dikemukakan) SP8 membilang dan counter check nombor siri. Disahkan 48 keping yang dikemukan sama dengan senarai.

[23] SP8 also gave the following evidence when the deputy public prosecutor continued with the examination in chief:

Bila OKT1 ditangkap dan siapa ditangkap:

OKT1 ditangkap awal pagi pada 4.05.04. Tangkapan ialah atas arahan saya kepada Insp. Nasaruddin, Cpl Tamil, L/Kpl Mohammad dan L/Kpl Mohd Noor. Saya mengarahkan mereka mengesan dan menangkap suspek ini.

Saya pertama kali jumpa lebih kurang jam 1.30–1.40 pagi ekoran suspek dibawa ke Pejabat D9 di Transit Quarters selepas ditangkap oleh Insp. Nasaruddin.

Suspek dibawa ke Pejabat D9, beberapa soalan awal ditanya kemudian dibawa ke IPD Kuantan.

Soalan awal mengenai kes. Dibawa ke IPD untuk membuat laporan polis dan serah pada IO. Seterusnya suspek dimasuk dalam lokap. Saya berjumpa dengannya jam 11 pagi pada 4.05.04. Saya dimaklum oleh Insp. William bahawa 2 orang suspect diambil remand selama 14 hari. Saya berjumpa suspect di pejabat CPJ (IPD).

Bersama saya ketika itu Insp. Mohd Noor dan ASP Koh Ah Tian. Pada mula saya bersama pegawai menyuruh siasat Wong Thean Fah. Kemudian dia meminta dia ingin bercakap dengan ASP Koh seorang diri. Saya benarkan. ASP Koh membawa suspect ke dalam bilik di pejabat CPJ. Hanya mereka berdua. Kemudian ASP Koh keluar dari bilik. Ekoran itu saya bersama pasukan saya yang terdiri dari Insp. Mohd Noor dan dalam 2 buah kereta i.e. di depan suspect No. 1 dan ASP, drebarnya. Saya ikut dari belakang dan kami pergi ke tepi pantai Taman Teruntum kawasan di belakang gelanggang squash MPK.

Waktu itu lebih kurang tengah hari 4.05.04.

Setiba di kawasan tersebut saya lihat suspect Wong Thean Fah membawa ASP Koh ke satu kawasan di tepi pantai dan menyatakan bahawa mayat ditanam di tepi pantai tersebut.

[24] The relevant portions of the cross-examination of SP8 by counsel of the first and second accused are the following:

CROSS-EXAMINATION of SP8 by Vignesh Raju.

Sebagai ground commander saya dipertanggungjawab kepada memantau kejadian culik oleh pengadu. Terdapat maklumat mengenai latar belakang mangsa, kalau ada motifnya dan berusaha untuk menjuruskan kepada kemungkinan jenayah yang terlibat.

Saya bersetuju saya telah menemuramah ibu mangsa.

4.05.04 di bilik CPJ, OKT1 tidak dipanggil. Kami balik dari tempat kejadian dan terus menghala ke bilik tersebut.

OKT1 ada bersama ASP Koh.

Apabila sampai di bilik CPJ dia sudahpun ada di bilik itu. Soalan yang saya gunakan di bilik CPJ, saya tak dapat ingat in particular tapi ada tanya soal mengenai kes.

Bila memaklumkan soalan mengenai kes, antara lain soalan ialah mengenai wang.

Sebelum 4.05.04 dicadangkan awak telah pun mempunyai makluman bahawa wang tebusan yang dituntut ialah RM10,000:

Setuju.

Semasa bertanya soalan mengenai wang ada 4 anggota lain. P19 dirujuk — Laporan dirujuk.

Dalam laporan saya tidak menyatakan saya ada menyoal OKT1.

Dalam penyoalan kamu adakah ia menyata apakah wang yang dinyatakan?

(Did he tell you orally what the money was about).

Wang itu merujuk kepada wang tebusan. Dalam laporan itu saya tidak nyatakan.

Mengikut laporan saya ada memberi amaran mengikut s. 113 KAJ.

Q: Adakah kamu explain apakah maksud amaran itu?

A: Saya terangkan dan OKT kata dia faham amaran itu.

Is there a statement to show he understood?

No.

Dia membawa saya ke satu rumah. Adakah alamat rumah yang dimaksudkan itu tidak dinyatakan alamat rumah.

Laporan polis P19 tidak lengkap?

Tidak setuju.

Semasa memberi amaran adakah memeriksa badan ketika itu?

Tidak.

Saya boleh ingat alamat rumah, iaitu No. 36 Lorong Air Putih 1, Kuantan.

Semasa saya, anggota lain dan OKT1 pergi ke rumah tidak ada orang lain di rumah itu.

Rumah itu dikunci. Saya tahu sebab apabila masuk di rumah itu didapati ada barang-barang yang menunjukkan ada orang yang tinggal di rumah itu.

Saya tidak masuk ke bilik-bilik lain untuk memastikan apakah barang-barang lain di rumah itu.

Saya dipandu arah oleh suspek. Saya masuk ke bilik yang disewa suspect dahulu.

Dari sana suspect telah membawa saya ke bilik air.

Dalam penyiasatan mengikut fahaman bilik air terletak di bilik yang saya masuk (attached bathroom).

Bilik yang disewa itu tidak saya pasti sama ada ia bilik utama atau antara satu bilik.

Saya tak ingat ada berapa bilik di tingkat satu.

Cadangan:

Awak tak ingat bilik air itu digunakan untuk 2 bilik?

Setahu saya bilik air itu ia bathroom attached.

I will not be able to answer whether the bathroom serves 2 bedrooms. Can't remember. I can only remember there was an empty pail. Tak ingat benda lain yang mungkin ada.

Semasa saya sampai pintu bilik air itu terbuka.

Macam mana suspect tunjuk beg orange?

Dia bawa saya ke bilik, kemudian dia bawa ke bilik air kemudian dia mengatakan wang ada dalam plastik orange itu adalah ketara dilihat.

Saya sendiri yang ambil beg plastik itu. Setelah ambil saya tidak membuat marking di atas beg plastik itu.

Tiada finger print yang diambil atas wang kesemuanya iaitu 48 keping.

Cadangan:

Sebelum 4.05.04 semasa ambil beg plastik awak ada maklumat tentang wang di rumah itu?

Tidak betul.

4.05.04 OKT1 dijumpa dalam 1.30 pagi dan ditanya beberapa soalan.

Cadangan:

Semasa bertanya soalan 1.30–1.40 tiada caution yang diberi?

I did.

Selepas 1.40 pagi OKT1 dijumpa lebih kurang 11.30 pagi lagi.

Dari 1.40 ke 11.30 pagi dia telah dibawa ke IPD Kuantan untuk membuat laporan polis diserahkan kepada IO dan saya dimaklumkan dia dimasuk ke lokap.

Saya habis lebih kurang 3 pagi.

A Cadangan:

Dari lebih kurang 3 pagi ke 11.30 pagi saya setuju saya tidak tahu apa keadaan sebenarnya.

11 pagi saya jumpa OKT1 di mana dia kata dia hendak jumpa Asp Koh Ah Tian
B yang ketika itu Ketua bahagian Siasatan Jenayah Daerah Maran. Dia dipanggil membantu dalam Operation Galing.

Cadangan:

ASP Koh diminta bantu sebab mereka fasih dalam bahasa Cina sahaja.

C Tak setuju.

Kenapa OKT1 mahu cakap dengan ASP Koh sahaja?

Saya tak dapat jawab soalan ini.

Saya tidak tanya kenapa dia hendak cakap dengan ASP Koh sahaja.

D

Adakah procedure biasa atau lazim suspect memilih mana-mana pegawai polis untuk memberi maklumat?

Tidak setuju saya (not that I know of).

E

[25] It is then material to address the words which the first accused uttered directly to SP8 himself soon after the return from the beach. I find that the statement uttered by the first accused to SP8 is found in P19 which is as follows:

F

BALAI POLIS Kuantan Siapa yang ambil report Sendiri Waktu dan haribulan report 4.30 petang, 4/5/2004. Nama Krishnan A/L Kesavan Nair (DSP) G/9180 lelaki atau perempuan Lelaki umur 44 thn keturunan India bahasa Malaysia pekerjaan Pegawai Kanan Polis tempat tinggal P.T D9 JSJ IPK Pahang pendakwa itu.

G

Aduan kata-

Pada jam l/kurang 1620hrs 4/5/04, saya bersama sama C/Insp Mohd Noor (PPKG IPD KTN), D/Kpl 112021, D/Kpl 111069, 119485 dan D/L/Kpl 118882 bersabit Kuantan Rpt: 6470/04, di pejabat JSJ IPD Kuantan bersama okt nama
H Wong Thean Fah KPT: 721103-10- 6183 telah baca dan terangkan amaran dibawah Sek. 113 KPJ seperti berikut iaitu 'Adalah kewajipan saya memberi amaran kepada kamu, bahawa kamu tidak diwajibkan berkata apa apa jua atau menjawab apa apa soalan, tetapi apa apa jua kamu katakan, sama ada sebagai jawapan kepada sesuatu soalan atau tidak, boleh diberikan sebagai keterangan' dan
I kamu juga berhak untuk tidak menjawab apa apa soalan. Selesai saja baca dan terangkan amaran ini, okt terus berkata 'wang saya ada simpan didalam bilik air di rumah sewa saya'. Saya terus jadikan pengakuan ini sebagai maklumat dan membuat repot Polis. Inilah pengaduan saya.

P21:

BALAI POLIS Kuantan Siapa yang ambil report Sendiri Waktu dan haribulan report 5.15 petang, 4/5/2004. Nama Krishnan A/L Keseven Nair G/9180 lelaki atau perempuan Lelaki umur 44 thn keturunan India bahasa Malaysia pekerjaan Pegawai Kanan Polis tempat tinggal PT D9, JSJ IPK Pahang, pendakwa itu.

Aduan kata-

Pada jam lebih kurang 4.30 petang, 4/5/2004, saya bersama S/Insp. Mohd Noor (PPKGPM KTN), angguta terdiri drp D/Kpl. 112021, D/L/Kpl 111069, 119485 dan 118882, bersabit kuantan repot: 6470/04, dan dipandukan arah OKT nama: WONG THEAN FAH. KPT: 721103-10-6183, telah pergi ke Air Putih Sampai di Hotel Greenlast Air Putih OKT terus berkata 'Rumah Saya dibelakang Hotel' sampai dirumah No; 36, Lorong Air putih 1, ktn OKT membawa saya dan angguta masuk kedalam ini ditingkat 1, dan masuk kedalam bilik Air tingkat 1. OKT terus tunjukkan Kepada dengan berkata 'WANG ADA DALAM PLASTIK ITU' Saya terus periksa satu Plastik Warna Orange dan didalamnya terdapat wang tunai RM4800 (Note: RM100 sebanyak 48 keping). Saya semak no siri wang ini dan saya catit dilampiran A. Saya rampas barang ini dan serahkan searchlist kepada OKT ini. Rampasan ini untuk siasatan bersabit Kuantan repot: 6470/04. Sekian Repot Saya.

[26] In the course of giving evidence SP8 was also questioned about the second accused by counsel for the second accused and the questions are as follows:

Saya memang ground commander bagi Ops ini. Saya membuat siasatan, tangkap dan saya dibantu oleh beberapa anggota.

Pada 3.05.04, 11.45 malam bersama satu pasukan ke Kopitiam Millenium. Semasa tiba di sana salah satu tugas ialah mengumpul intelligence. Saya terima maklumat OKT2 berkemungkinan suspect dalam kes ini oleh kerana analisis yang dibuat terhadap nombor telefon mangsa.

Berdasarkan analisis dikenal pasti satu nombor telefon dan mengikut maklumat nombor telefon kepunyaan suspect No. 2. Bila sampai di Millenium Kopitiam saya duduk di sebuah meja di kedai kopi dan melihat pergerakan pekerja di kedai itu. Anggota bersama saya. Kemudian saya gunakan handphone untuk mendial suspect ini. Saya perhati suspect 2 menjawab telephone. Saya bagi arahan kepada anggota bersama saya untuk menghampiri suspect. Saya memperkenalkan diri saya sebagai polis, meminta kad pengenalan dan memaklumkan saya akan menangkapnya.

Daripada kedai kopi itu dia dibawa dalam kereta anggota ke Pejabat D9 Transit Quarters.

Di Transit Quarters saya ada menjalankan soal siasat. Insp. Nasaruddin, Kpl Tamil, Kpl Mohammad, Insp Nasaruddin juga ada di kedai kopi.

Soal siasat berlaku selama 1/2 jam. Tak setuju OKT dipukul.

Kenapa dibawa ke Transit Quarters?

Oleh kerana ia juga pejabat untuk D9 cawangan siasat kes jenayah berat dan serious.

A Quarters itu 2 kilometre dari IPK. D9 dijadikan pejabat juga pada awal 2004.

Cadangan: Tangkapan dibawa ke tempat ini untuk interrogation (exclusive) supaya anggota kes tak tahu:

Salah satunya tujuan.

B Semasa membuat penyiasatan OKT2 dan menangkapnya di Kopi Tiam saya telah jumpa duit di kocek seluar sebelah kanan suspect. Seluarnya adalah seluar jeans.

Saya tak pasti sama ada seluar ini dirampas.

Cadangan: *OKT2 dipukul hingga teruk di muka*.

C Semasa tangkapan berlaku sedikit pergelutan. Saya ada anggota 4 orang was managed to overpower him.

Sebelum tangkapan ada buat risikan mengenai later belakang OKT2? Saya tidak ada maklumat mengenai kegemaran beliau meletak bet bagi English Premier League.

OKT2 tidak memaklumkan duit itu adalah hutang yang telah diserahkan balik.

D OKT2 di Transit Quarters sementara pengesanan terhadap suspect 1 dilakukan. Kemudian bersama suspect 1 dia dibawa ke IPD Kuantan. Selepas itu mereka diserahkan kepada Insp. William.

Cadangan: Selepas itu pasukan diketuai C/Insp. William teruskan soal siasat: Tak
E setuju. Saya serah pukul 3 pagi. Arahannya ialah mereka dimasukkan ke dalam lokap.

OKT2 saya tak dapat jawan soalan Task Force... OKT2 di dalam kawal selia ASP Sampornak.

F **[27]** The evidence of SP9 is supplemental to SP8 and is as follows:

SP9: ASP Koh Ah Tiam G/10563 ....

Pada jam 11 pagi hari saya diarahkan oleh DSP Krishnan (Pegawai Turus D9 IPK Pahang) datang ke IPD Kuantan di pejabat Cegah Jenayah bagi membantu soal
G siasat ke atas satu kes culik yang berlaku di Kuantan.

Pada masa itu satu orang suspect bernama Wong Thean Fah (boleh dicam) OKT1. Soal siasat difahamkan ke atas suspect oleh En Krishnan, Insp. Mohd Noor dan saya. Soalsiasat dijalankan seperti biasa iaitu soalan 2 yang dikemukakan adalah berkaitan dengan kes yang disiasat.

H *Tiada apa jenis kekerasan digunakan terhadap suspect ketika soal siasat berjalan suspect Wong Thean Fah memberitahu kepada En Krishnan bahawa suspect akan memberitahu kepada saya sesuatu hal*. Selepas saya diberitahu begitu saya mendapat kebenaran dari En Krishnan untuk membawa Wong Thean Fah ke dalam bilik Insp. Shafie Pegawai Pencegah Jenayah IPD Kuantan. Pada masa itu Insp. Shafie
I tiada di situ.

Apabila sampai ke bilik saya tutup pintu dan di situ saya tanya dia beberapa soalan. Seterusnya Wong Thean Fah memberitahu dia hendak memberitahu saya sesuatu. *Selepas itu saya terus membaca amaran di bawah s 113 KPJ dalam Bahasa Malaysia dan saya terangkan dalam Bahasa Mandarin*.

Selepas diterangkan kepada suspect dan saya tanya dia sama ada dia faham dengan amaran yang dibacakan itu. Beliau menyatakan dia faham. Selepas itu suspect meberitahu saya 'mangsa telah mati dan kita tanam di pantai'. Dia bagi tahu... saya kurang ingat tentang perkataan... A

Objection: Dia memberi opinion kerana jawapannya 'Saya' maksud orang yang diculik. B

Apakah exact words. Dia kata 'Ah Bee sudah mati dan kita tanam di pantai'. Saya faham itu sebagai orang yang diculik.

Selepas itu saya terus bawa mangsa keluar dari bilik dan maklumkan En. Krishnan. Selepas itu suspek beritahu dia akan bawa ke tempat yang ditanam. *Kemudian saya bersama beberapa anggota membawa suspect dalam kereta dan En. Krishnan juga bersama anggota lain menaiki kereta lain, iaitu termasuk En. Mohd Noor. Kami terus menuju ke tepi pantai* yang dimaksudkan itu, iaitu di bahagian belakang gelanggang squash MPK di Taman Teruntum Kuantan. C

Apabila sampai di situ *Wong Thean Fah membawa saya ke suatu kawasan pantai menunjukkan kepada saya kawasan yang ditanam Ah Bee*. Selepas itu saya terus bagi tahu En. Krishnan dan beliau mengarahkan saya supaya jangan mengusik tempat itu sementara menunggu kehadiran unit anjing. D

Kawasan yang ditunjukkan ialah kawasan pantai bahagian belakang gelanggang squash yang berpasir. Pada masa itu saya bersama En. Krishnan, Insp. Mohd Noor, jurugambar dan anggota lain, Kpl Johari, Kpl Tamil, L/Kpl Zahari, L.Kpl Ruhaizah, L/Kpl Rozaidi jurugambar, L/Kpl Mohd Noor. Waktu ketika itu jam 12.30 tengah hari hari (lebih kurang). E

Selepas itu saya, suspect dan anggota lain menunggu sehingga kedatangan unit anjing. F

Saya nampak masa itu ASP Sampornak tiba dengan suspek satu lagi dan anggota lain. Mereka sampai 20 minit selepas saya ditunjuk kawasan dan saya disuruh tunggu

Kemudian En Krishan meminta saya dan anggota pergi ke tempat yang ditunjukkan Wong Thean Fah. Apabila sampai ke tempat itu saya mengarahkan anggota menggali. Selepas menggali mula-mula yang kami nampak jari. Penggalian dibuat dengan menggunakan penyeduk (shovel). Memang ada satu shovel di kawasan itu dan seterusnya kami nampak ada satu mayat. Mukanya ke bawah keadaan tiarap. Kedua-dua tangan diikat bahagian belakang badan, kakinya juga diikat dengan tali berwarna hijau. Mayat itu berpakaian T-shirt dan seluar pendek. G H

Semasa di kawasan dia menyatakan tempat itu adalah tempat Ah Bee ditanam.

[28] The evidence given by SP9 relating to the statement uttered by the accused is also met with the objection that a trial within a trial should be convened. Based on my earlier ruling the two police reports P26 and P27 made by SP9 were admitted as follows: I

Semasa soalan ditanya OKT1 dibawa ke bilik saya bertanya mengenai kes ini. Dalam soalan dia mengatakan: 'Ah Bee telah mati kita tanam di pantai'.

A Gambar dirujuk adalah tempat kejadian A, B, iaitu ada penyodok.

C kawasan yang ditunjuk sebelum digali.

E, F, MN — menunjukkan tempat Q, R, S, T mayat digali dan di alih. X tempat mayat ditanam.

B Mayat itu seterusnya dihantar ke hospital oleh pegawai penyiasat. Saya membawa Wong Thean Fah ke balai IPD Kuantan. Suspek diserah balik kepada En Krishnan. Saya ada membuat dua laporan.

Laporan dikemukakan P26.

C P27.

6731/04 itu laporan yang telah dibuat setelah membaca KAJ, iaitu sebelum maklumat itu diberitahu kepada saya berhubung dengan apa yang diperkatakan oleh Wong Thean Fah.

D 6734/04 — Laporan yang dibuat berkaitan dengan penemuan mayat.

TPR:

Sebelum saksi ini dilepas, saksi ini orang yang paling wajar. Stand down untuk arrange logistic dan jika boleh boleh diteruskan.

E

[29] A visit was made to the site where the body was recovered and some questions were posed to SP9 with regard to a shovel lying there and to the directions pointed out by the first accused with regard to where the body was buried.

F

Visit to the site

Parties as Before.

Soalan dari TPR kepada SP9.

G

Tempat di mana mayat dijumpai dan kawasan yang ditunjuk oleh OKT1 di mana mayat dijumpa.

SP9: OKT1 tunjuk kawasan yang dianggarkan dari satu penjuru bangunan gelanggang squash ada satu penyodok. Penyodok itu terletak seolah-olah ianya
H dalam satu alignment (or in line) dengan tempat di mana seolah-olah ia menunjuk ke arah satu timbunan tanah. Di timbunan pasir itulah panduan di mana kita telah menggali.

Semasa jumpa mayat keadaan sunyi masa itu tiada gembung pasir di hadapan seperti kelihatan kini — (a bund of sand across).

I

[30] After returning from the site SP9 was further cross-examined by counsel for the first accused with regard to the circumstances leading to the first accused making a statement leading to the discovery of the body:

4.05.04 terima panggilan dari DSP Krishnan untuk pergi ke IPK lebih kurang 1.30 pagi. Dia minta saya berada di IPK Kuantan jam 10 pagi. Dia minta hadir untuk membantu jalankan soal siasat berhubung dengan satu kes culik. Butir-butir kes culik tidak diberitahu.

4.05.04 lebih kurang 11 pagi itu pertama kali jumpa OKT1.

Pada 4.05.04 awal pagi ketika En. Krishnan di pejabat D9 saya cuma nampak OKT1 tanpa terlibat apa-apa masa itu.

Cadangan:

Sebelum temuramah dengan OKT1, saya tidak mempunyai butir-butir maklumat tentang kes.

Masa itu saya Pegawai Penyiasat Kanan di Maran.

Cadangan: Kemungkinan saya diminta bantu oleh sebab saya berbangsa Cina. OKT1 minta cakap dengan saya seorang dan kebenaran diperolehi dari SP8. Saya bukan pegawai penyiasat kes.

Dalam bilik Insp. Shafie saya telah bertanya beberapa soalan. Sebelum soalan-soalan itu ditanya (iaitu berhubung dengan kes) saya tidak memberi apa-apa caution walaupun saya tahu dia di bawah tangkapan polis.

P26: Laporan polis 6731/04.

Itulah amaran yang saya beri iaitu seperti tercatat dalam laporan itu. Pindaan-pindaan yang dibuat ialah saya sendiri.

Pindaan dibuat selepas saya taip dan baca.

Saya baca amaran dalam bahasa Malaysia dan terjemah ke bahasa Mandarin. OKT1 fasih dalam bahasa Mandarin. Saya tidak menjelaskan ini dalam laporan itu. Saya maklumkan dalam bahasa Mandarin dan dia faham bahasa Mandarin itu.

P26 — para 4 dari bawah:

'Itu Ah Bee sudah mati kita tanam dalam pantai' adalah kenyataannya dalam bahasa Mandarin.

Catatan itu adalah interpretation saya.

Cadangan:

Dia tidak pernah cakap itu:

Tak setuju.

Saya dimaklumkan nama mangsa Ah Bee. Saya tak tahu nama mangsa. Saya tak tahu nama singkatan mangsa.

Saya tak tahu Ah Bee adalah mangsa dalam kes ini.

Saya tiba dengan rakan lain di IPD dengan seorang rakan lain. Tiada kekerasan yang diguna. Saya tidak tahu apa yang berlaku sebelum jam 11 pagi.

Saya bawa OKT1 dalam sebuah kereta ke IPD Teruntum. Perjalanan itu lebih kurang 10–20 minit ke Pantai Teruntum. Kereta itu diekori kereta SP8.

Cadangan:

Saya sampai hampir sama dengan kenderaan belakang. Setiba di pantai saya diarahkan jangan buat apa-apa sehingga unit pengesanan sampai.

Sebelum unit sampai kami tidak menunggu di bawah pokok. Saya telah pergi ke belakang gelanggang squash. Saya pergi dengan 2 escort dan OKT1.

SP8 di tempat letak kereta semasa itu terang dan panas.

Di belakang gelanggang squash kami telah melihat kawasan itu. Gambar dirujuk.

Cadangan gambar C menunjukkan tapak warna berlainan dengan kawasan sekitar:

Setuju.

Dari tempat yang saya berdiri bersama OKT1 dan 2 escort tapak itu boleh dilihat.

Semasa locus in quo, saya telah menyatakan OKT1 telah menunjuk dari jauh ke arah itu.

Bila dia tunjuk saya jalan ke arah spot itu. Saya belum lihat jari.

Jari ini dilihat selepas dog unit kesan dan Krishnan arah menggali selepas itu baru kelihatan jari dan tangan dalam gambar D

[31] The contents of P26 and P27 are:

P26:

BALAI POLIS Kuantan Siapa yang ambil report Sendiri Waktu dan haribulan report 12.15 tengahari, 4/5/2004. Nama ASP. KOH AH TIAM. G/10563 lelaki atau perempuan Lelaki umur 42 Tahun keturunan Cina bahasa Malaysia pekerjaan Pegawai Kanan Polis tempat tinggal Jabatan Siasatan Jenayah, IPD Maran, Pahang pendakwa itu.

Aduan kata-

Pada jam lebih kurang 12.00 tengahari, 4/05/04, bersabit kuantan repot: 6470/04, di Pejabat JSJ IPD Kuantan, Saya bersama sama OKT nama: WONG THEAN FAH. KP NO: 721103-10-6183, telah baca dan terangkan amaran di bawah sek: 113 KPJ kepada OKT Ini seperti berikut 'Adalah kewajipan saya memberi amaran kepada kamu, bahawa kamu tidak diwajibkan berkata apa apa jua atau menjawab apa apa soalan, tetapi apa apa jua yang kamu katakan samada sebagai jawapan kepada sesuatu soalan atau tidak boleh diberikan sebagai keterangan.' Setelah selesai saya baca dan terangkan amaran ini, OKT terus berkata kepada saya 'Itu AH BEE sudah mati, kita tanam di pantai' Saya terus jadikan pengakuan ini sebagai maklumat dan saya buat laporan polis. Ini lah Laporan Saya.

P27:

BALAI POLIS Kuantan, Pahang Siapa yang ambil report Sendiri Waktu dan haribulan report 4.15 Ptg 4/5/2004 Nama ASP Koh Ah Tiam, G/10563 lelaki atau perempuan Lelaki umur 42 Tahun keturunan Cina bahasa Malaysia pekerjaan Peg. Kanan Polis tempat tinggal JSJ IPD Maran, Pahang pendakwa itu.

Aduan kata-

Pada jam lebih kurang 12.20ptg, 4/5/2004, bersabit kuantan repot: 6470/04, saya bersama angguta terdiri daripada D/Kpl. 84148, 112021, D/L/Kpl. 121240, 127087 dan 110071 dan Juru Gambar D/L/Kpl. 56944, dipanduarah OKT nama: WONG THEAN FAH, KPT: 721103-00-6183, Telah pergi keTaman Teruntum berdekatan gelanggang Squash MPK Kuantan. OKT ini terus membawa saya dan angguta ke kawasan pasir pantai dan terus berkata 'Ini lah tempat nya'. Saya dapati tempat yang OKT Tunjukkan dimana pasirnya agak tinggi dan tidak rata. Saya arahkan jurugambar D/L/Kpl. 56944 mengambil gambar tempat yang ditunjukkan olih OKT. Saya dan disaksikan olih OKT, telah arahkan angguta ia itu D Kpl. 84148, 112021, D/L/Kpl. 121240, 127087 dan 110071 mengali pasir ini dan telah menjumpai satu mayat manusia disyaki lelaki berbangsa cina, tangan diikat dibelakang dan kaki diikat dalam keadaan tertiarap, saya arahkan jurugambar mengambil gambar keadaan mayat ini. Mayat ini memakai baju T, shirt putih dan seluar pendek warna gelap. Turut dijumpai ditempat kejadian sebatang penyedok pasir berulu kayu. Mayat ini kami telah bawa ke hospital Tengku Ampuan Hafzan untuk dibedah siasat bagi membantu siasatan bersabit dengan kuantan repot: 6470/04. Ini lah repot Saya.

[32] However after the evidence of SP9, the prosecutor sought to recall SP7 whose evidence has been given earlier on. This request is also met with objections. The application is allowed having regard to the provisions of s 425 of the Criminal Procedure Code which states the following:

> Any court may at any stage of any inquiry, trial or other proceeding under this Code summon any person as witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

[33] As explained in *Public Prosecutor v Yap Kok Meng* [1974] 1 MLJ 108, per Hashim Yeop Sani J (as he then was) it is 'a fundamental in the system of justice as we know it that a person accused of a criminal offence must know of the charge against him'. I did not discern any justifiable reason to refuse the application for the defence still had a full opportunity to cross-examine on his evidence.

[34] At this stage of the trial counsel for the second accused similarly raised the objection that a trial within a trial should be conducted as SP7 embarked on giving evidence with regard to certain words uttered by the second accused in the course of being questioned by SP7. The relevant portion of the evidence is also produced verbatim:

> Soal siasat dijalankan di IPK Pahang. Alamatnya di Jalan Gambut, Kuantan Pahang. IPK dan IPD tidak tempat yang sama. IPD Pahang di Jalan Mahkota. Soal siasat di bilik maklumat IPK Pahang. Proses ini dibantu 4 orang Det. Kpl. Jumaat,

A Det. L/Kpl. Ooi, Det. L/Kpl. Mat Zain, Det. L/Kpl. Roswadi. Seorang anggota saya jurubahasa Chan Yoon Choy menggunakan Bahasa Cina dan bahasa Malaysia. Cara soal siasat saya tanya dan dia jawab soalan. Dia jawab semua soalan. Ada juga dia tak jawab. *Tapi dia bekerjasama pada keseluruhannya dalam proses ini*.

Soalan yang ditanya:

B *Saya memberi amaran di bawah s 113 KAJ (CPC). Saya bertanya latar belakang dia secara menyeluruh dan tanya kenapa dia ditangkap. Semasa soal siasat ini OKT 2 ada beri maklumat mengatakan Ah Bee telah ditanam*.

Bob Arumugam

C Whether trial within trial — perlu.

DPP

Soalan belum lagi penemuan fakta. Pada tarikh lepas telah dikemukakan. Bantahan telah pun dikemukakan. Ada isu yang mungkin jadi penghujahan. Ini untuk mahkamah diberi maklumat berlainan dan membawa ke fakta yang sama.

D

Bob Arumugam

Mahkamah menjawab: Saya tidak menyokong bantahan ASP Sampornak teruskan.

E Maklumat: *Ah Bee ditanam di pantai. Dia juga berkata ia boleh tunjukkan. Saya kemudian membuat laporan polis mengenai maklumat itu*.

Laporan dirujuk.

Saksi sahkan laporan itu. Salinan laporan dikemukakan P28. Saya membawa suspek dan pasukan saya ke tepi pantai. Menggunakan kenderaan polis dan
F dipandukan suspek Chan Yoon Choy OKT 2 memandu sehingga ke tepi pantai berhampiran gelanggang squash MPK Taman Teruntum.

Sampai di situ saya nampak ramai anggota polis di tepi pantai. Saya ingat DSP Krishnan dan ASP Koh Ah Tiam. Selain anggota polis ada seorang lelaki Cina — tangannya digari (OKT 1) dicamkan. Pada masa saya tiba DSP Krishnan dan ASP
G Koh Ah Tiam sudah berada di situ. Bila mereka sampai saya tak pasti. Seterusnya OKT 2 pada masa itu tangannya bergari di depan. Saya bertanya di mana Ah Bee ditanam. Dia tunjuk di suatu arah di pantai. *Pada masa itu dia tak pasti di mana (maknanya dia tidak pinpoint tempat yang tepat)*. Jadi pegawai dan anggota mencari di pantai di kawasan yang ditunjukkan. Ada anggota telah terjumpa nampak jari
H manusia timbul di pasir. Anggota telah mengorek tempat dan satu mayat telah dijumpai.

Keadaan mayat:

Meniarap, tangan terikat dan kaki juga terikat. Saya bawa OKT 2 ke tempat dan bertanya beberapa soalan. Mayat itu diuruskan oleh DSP Krishnan dan ASP Koh
I Ah Tiam. Selepas itu saya buat laporan polis di Balai Polis Kuantan bersama dengan OKT 2 berkenaan dengan penemuan mayat. Laporan Polis dirujuk. Penemuan mayat 4.25 petang. Salinan kemukakan P29.

[35] SP11 assisted SP7 as an interpreter to translate the caution

administered by SP7 to the accused. SP11 explained that while the normal Chinese dialect spoken by the second accused is Hakka but in his evidence it was clarified as follows:

Cross-examination

Jam 12.15 hrs 4.5.2004 di IPK Pahang Kuantan saya diminta ASP Sampornak membuat persoalan. Pada masa itu Chan Yoon Choy di bilik detective. Setahu saya mereka ditangkap pada 3.5.2004. Yang menangkap ia DSP Krishnan dan anggota. Selepas ditangkap saya tidak tahu di mana mereka ditangkap. Saya tidak terlibat dalam soal siasat selepas mereka ditangkap.

Pertama kali saya melihat mereka ialah pada 4.5.2004. OKT 2 hendak bercakap dalam Bahasa Cantonese. Dia kata dia Hakka. Saya berbual dengannya dalam Bahasa Cantonese. Saya Hokkien. Saya jadi jurubahasa sebab OKT 2 tak fasih dalam Bahasa Malaysia. Pada masa itu dia digari. Saya tidak ingat sama ada saya bertanya latar belakang.

Arahan saya — dia tahan dilokap dan kemudian dipukul di transit: Tidak, dia tidak beritahu saya.

Apakah soalan ditanya sebelum dia disoal siasat:

Saya tak ingat. Pada masa itu bersama saya ASP Sampornak, Det. Kpl. Jumaat, Det. Kpl. Mat Zain dan Roswadi. Sebelum itu OKT tidak dipukul. Saya tak bersetuju dia dipukul oleh team ASP Sampornak.

Put

Dia tak pandai jawab soalan. Dia tak berapa cerdik:

Dia biasa, nak kata tak cerdik tak sangat.

Semasa mula soal siasat apa yang dibuat:

Sampornak membaca amaran dalam Bahasa Malaysia. Saya terjemah amaran menurut s 113 CPC.

Saya dibayar allowance dalam Bahasa Cantonese. Saya menjalani ujian dalam JPJ.

Percakapan Amaran

Adalah menjadi kewajipan saya memberi amaran kepada kamu bahawa kamu tidak diwajibkan berkata apa-apa jua atau menjawab apa-apa soalan jua. Tetapi apa-apa jua kamu katakan sama ada jawapan kepada sesuatu soalan atau tidak boleh diberi sebagai keterangan.

Amaran 113 CPC

Selepas itu saya translate dalam Bahasa Cantonese dan kemudian ASP Sampornak arahkan saya tulis dalam bahasa yang lebih difahami ke OKT 2.

Selepas itu ada ASP Sampornak mengatakan jika dia tidak mahu bercakap masa itu ia boleh bercakap di mahkamah:

Ada. Dia juga diberitahu jika tidak bercakap masa itu wajib bercakap di mahkamah. Saya hafal amaran di bawah s 113 CPC.

[36] The contents of P28 and P29 are:

P28:

BALAI POLIS Kuantan Siapa yang ambil report Sendiri Waktu dan haribulan report 1300 hrs. 4/5/2004 Nama ASP SAMPORNAK BIN ISMAIL G/9999 lelaki atau perempuan Lelaki umur 42 th. keturunan Melayu bahasa Malaysia pekerjaan Pegawai Kanan Polis tempat tinggal D7 JSJ PDRM IPK Pahang pendakwa itu.

Aduan kata-

Pada jam lebih kurang 1215 hrs, 4/05/04, bersabit Kuantan rpt. 6470/04, di pejabat D7 JSJ IPK Kuantan, saya bersama-sama anggota terdiri daripada Kpl. 73475, D/L/Kpl. 116183 122124 dan 122536 semasa menjalankan soalsiasat keatas suspek CHAN YOON CHOY KPT. 760827-08-5973 saya telah bacakan dan terangkan amaran dibawah sek. 113 KPJ kepada suspek dengan diterjemahkan oleh D/L/Kpl 116183 daripada Bahasa Malaysia/Kantonis ini seperti berikut 'ADALAH KEWAJIPAN SAYA MEMBERI AMARAN KEPADA KAMU, BAHAWA KAMU TIDAK DIWAJIPKAN BERKATA APA-APA JUA ATAU MENJAWAP APA-APA SOALAN, TETAPI APA-APA JUA YANG KAMU KATAKAN SAMADA SEBAGAI JAWAPAN KEPADA SESUATU SOALAN ATAU TIDAK BOLIH DIBERIKAN SEBAGAI KETERANGAN'. 'KAMU JUGA BERHAK UNTUK TIDAK MENJAWAP APA-APA SOALAN'.Setelah selesai saya bacakan dan terangkan amaran ini, Suspek terus berkata kepada saya 'ITU AH BEE ADA TANAM DI PANTAI'. Saya terus jadikan pengakuan ini sebagai maklumat dan saya buat laporan polis. Inilah laporan saya.

[37] P29:

BALAI POLIS Kuantan Siapa yang ambil report SendiriWaktu dan haribulan report 4.20pm 4/5/2004 Nama ASP SAMPORNAK BIN ISMAIL G/9999 lelaki atau perempuan Lelaki umur 42th. keturunan Melayu bahasa Malaysia pekerjaan Pegawai Kanan Polis tempat tinggal D7, JSJ PDRM IPK Pahang pendakwa itu.

Aduan kata-

Pada jam lebih kurang 1320hrs.4/5/04, bersabit Kuantan repot 6470/04, saya bersama anggota terdiri daripada D/kpl.73475, D/L/Kpl. 118183,122124 dan 122536 dengan dipandu arah OKT bernama CHAN YOON CHOY KPT. 760827–08–5973 telah pergi ke Taman Teruntum berdekatan gelanggang Squash MPK Kuantan. OKT ini terus membawa pasukan kami ke kawasan pasir tepi pantai dan OKT telah berkata 'itulah tempat tanam AH BEE'. Saya dapati tempat tersebut adalah pasirnya tidak rata. Masa itu OKT WONG THEAN FAH KPT 721103–00–6183 ada ditempat tersebut. Saya kemudian bersama sama dengan OKT CHAN YOON CHOY melihat beberapa anggota Polis sedang mengali kawasan pasir tempat tanam Ah Bee. Saya nampak satu mayat manusia disyaki lelaki berbangsa Cina, tangan diikat dibelakang dan kaki diikat dalam keadaan tertiarap. Mayat itu kemudian disahkan olih OKT CHAN YOON CHOY sebagai AH BEE. Mayat kemudian dibawa ke Hospital Tengku Ampuan Hafzam Kuantan untuk dibedah siasat bagi membantu siasatan bersabit dengan Kuantan rpt.6470/04. Inilah repot saya.

[38] The second accused was brought to the beach after the first accused. SP2 is the doctor who on 5 May 2004 conducted a post mortem while on duty as a forensic expert at Hospital Tengku Ampuan Afzan Kuantan. The post mortem was carried out in respect of the deceased Woo Chen Chew who had been identified by his brother Woo Chen Yu. According to him the corpse was already in a state of early decomposition. In his examination he stated that the deceased was found bound by a nylon rope at the wrists and the ankle. Apart from the abrasion wound at the wrist there was no injury to his mouth, teeth or neck. No injury was also discerned to the scalp on his brain. Overall the body organ and tissues were already in a state of decomposition. The most crucial feature of his evidence was his finding that the cause of death was asphyxia that the body had been placed in an abnormal position with face placed downwards (tertiarap). The description stated was that the chest, abdomen and diaphragm must have been in a constricted position eg someone who is covered with sand. This was described as traumatic asphyxia. There must have also occurred posterial asphyxia that is a person who found it difficult to breath as the posterior part of the body was in a lower portion where it could be difficult to breath. The final analysis of SP2 is that, the death is consistent with someone who had suffered asphyxia as a result of being buried in sand.

THE EVALUATION OF THE PROSECUTION'S CASE

[39] At the end of the case for the prosecution a separate evaluation has to be made in respect of the evidence against the first and second accused while ascertaining contemporaneously whether common intention is established. It is proposed firstly to deal with the charge of kidnapping irrespective that the first charge pertains to s 302. This is premised on the manner in which the prosecution through the evidence of SP8 brought forth evidence relating to the discovery of the money before the evidence on the discovery of the body.

[40] The prosecution relies on P19 (the statement) and P20 (the search list). On arrival at the premises No 36, Lorong Air Putih, Kuantan, the first accused, which according to SP8 was shown with the guidance of the first accused certain other words were uttered by the first accused which eventually led to the finding of an orange plastic in which was found 48 pieces of RM100 as described in P20 the search list (police report P21).

[41] The evidence of SP8 constitutes two parts; the part that describes the words that were uttered to him directly and his reference to the statements made to SP9 by the first accused. The conditions necessary for the application of s 27 are:

(a) the fact of which evidence is sought to be given must be relevant to the issue;

A (b) the fact must have been discovered in consequence of some information received from the accused;

(c) the person giving the information must be accused of an offence;

(d) he must be in the custody of a police officer; and

B

(e) the discovery of a fact in consequence of information received from an accused in custody must be deposed to.

[42] In the circumstances of this case as detailed above the exact words C uttered by the first accused according to SP9 were 'Ah Bee sudah mati dan kita tanam di pantai. Saya faham itu sebagai orang yang diculik'.

[43] Emanating from these words the first accused brought the police party comprising SP9, SP8 and police personnel Mohd Noor to a beach situate D behind a squash court MPK at Taman Teruntum Kuantan. It is noted that the evidence indicates that the first accused brought the police party that includes SP9 to a 'kawasan' (area). Four other police personnel were also present. The fact is a body is indeed recovered and subsequently positively identified by the mother SP1 who has reported that her son Woo Chen Chew has gone E missing.

[44] Hitherto there is nothing in the evidence of SP8 or SP9 to indicate that knowledge has been obtained or procured that the 'missing person' is no longer alive. There is only the evidence of SP1 who said that she requested to F speak to her son but of no avail. It cannot be inferred that the police could have known then that Ah Bee was no longer alive. Moreover SP15 who conducted the surveillance of Pusat Hiburan Nurbaya (the premises where the mother was instructed to leave the money in the toilet) was questioned.

G

[45] During cross-examination SP15 was questioned by counsel for the first accused for the reason for which an arrest was not made when he saw a Chinese male behaving suspiciously carrying a package and his reply was:

H

> Saya tidak membuat tangkapan dan juga tidak mengekorinya. Ini adalah arahan ketua terus.

[46] During re-examination by the deputy public prosecutor SP15 explained:

I

> Saya tidak mengekori sebab lelaki bukan suspek yang disahkan terlibat. Yang kedua D9 pegawai terus mengarahkan membuat pemerhatian sahaja dan bukan membuat tangkapan. Tindakan mengekori dan menangkap boleh membahayakan nyawa mangsa.

[47] This reveals that at 29 April 2004 the police still perceived that the victim was alive. A

[48] I find that at the time the words were uttered by the first accused to SP9 regarding Ah Bee (the deceased), a new offence is being disclosed — that is a person has died and has been buried. B

[49] An analogy is found in the case *Lim Chee Lan v Public Prosecutor* [1948] MLJ 71. The situation is as described in the judgment of William CJ as follows: C

> ... The two detective police constables were sent out to investigate whether they could obtain any information regarding the carrying on of *Chee fah* lotteries. If they had discovered any information concerning such lotteries, then any statement regarding the information so discovered would have been a statement in a police investigation. But in the course of that investigation an entirely different set of D circumstances arose, ie they were bribed by the appellant. Thereupon a fresh offence had been committed and they both made police reports concerning it. Because their superior police officer had been sufficiently prudent to anticipate that there might be an attempt to bribe them, and had given them instructions how to act in that event, it cannot be said that those reports were statements made in the course of a police investigation into the existence of a *Chee fah* lottery. To hold E otherwise would be to exclude a police report relating to murder, if for instance the appellant, instead of bribing the detective police constables, had stabbed one of them fatally.

F

[50] The second headnote states:

> (ii) Where in investigating one offence a police officer sees another offence committed his written statement as to that second offence is a 'police report' not a 'statement made in the course of a police investigation' and is therefore admissible in evidence, even though he suspected that such second offence might be G committed in course of his investigation of the first offence.

[51] In this case however while SP9 did not 'see' the act of burying, he is being told by the first accused that someone has died and has been buried. H On the same basis I find that P26 also constitutes a police report made after a body has been recovered apart from the fact that the requirements of s 27 are complied with. The contents of P26 is therefore admissible as evidence. This evidence is corroborated with the evidence of SP4 who positively identified the first accused who purchased a green coloured nylon rope from I the hardware shop where he works. These parts of the evidence provide links of the first accused to a fact of a body being found.

[52] SP8 gave oral evidence with regard to the circumstances in which the

A statement was made and he was cross-examined by counsel for the first accused. I find an analysis in the case of *Amathevelli a/p P Ramasamy v Public Prosecutor* [2009] 2 MLJ 367; [2009] 3 CLJ 109 is useful as a guidance to the facts before me. The relevant excerpts are produced:

B Mr Karpal Singh, learned counsel for the appellant, contended that it is not disputed that in P51, SP12 did not record the questions which led to the information being given by the appellant and that even in his oral testimony SP12 did not advert to any questions which were asked by him which led to the information being given which was as recorded in P51. Relying on *Public*
C *Prosecutor v Khoo Boo Hock & Anor* [1990] 1 CLJ 971; [1990] 2 CLJ 716 and *Public Prosecutor v Hashim bin Hanafi* [2002] 4 MLJ 176, it was submitted that the information given by the appellant should have been ruled inadmissible, with the result that the recovery of P40 and P44 A–F could not be linked to the appellant. Without the evidence of P51 the other circumstantial evidence are, in his submission, insufficient to constitute proof of the case against the appellant beyond
D a reasonable doubt.

However, as submitted by the learned DPP, looking at P51 one will find the question put to the appellant by SP12. The question reads:

Apakah yang kamu ingin memberi pengakuan kepada saya?

E

Further we agree with the learned DPP that s 27 does not require the question to be recorded before the information may be admitted under the said section. It is true that in *Public Prosecutor v Hashim bin Hanafi* Augustine Paul J (as he then was) did make the observation that evidence of the question asked is imperative on the
F facts of a particular case in order to have a proper appreciation of the answer. He said that in certain circumstances the question asked has to be read with the answer given by the accused as otherwise the answer would not make any sense. However, the learned judge made it clear that it is not in every case that the question needed to be adduced in evidence, it all depends on the facts of each case.

G However, that is not the end of the matter in so far as the admissibility of the information supplied by the appellant is concerned. The only evidence adduced by the prosecution of the information is the record of it as contained in P51. SP12 did not give any oral evidence of it. In commenting on the manner of giving evidence of information received under s 27, Augustine Paul J (as he then was) said in *Public Prosecutor v Hashim bin Hanafi* at pp 185–186:

H

Information given under s 27 is not a matter that is required by law to be in writing so as to be governed by ss 91 and 92 of the Act. Therefore the information must be proved by oral evidence pursuant to s 60(b) of the Act. Thus a written record of the information given by the accused will not by itself
I be substantive evidence of its contents and it is what the witness deposes in court as having been said by the accused that will be evidence (see *Bhagirath*). Where the information is contained in a police diary it can only be used for the purpose of refreshing memory (see *Public Prosecutor v Er Ah Kiat* [1966] 1 MLJ 9). Where it is contained in any other document it can, at the highest, serve only as evidence of corroboration. It is on this basis that a report prepared by a chemist

> pertaining to his analysis of drugs cannot be tendered as substantive evidence of its contents but only as corroboration of his oral evidence in court under s 157 of the Act (see *Saw Thean Teik v R* [1953] MLJ 124; *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273). The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible (see *DPP v Hester* [1972] 3 All ER 1056). Its role is to confirm other evidence in the sense that it renders that other evidence more probable (see *Doney v R* (1990) 171 CLR 207; *DPP v Kilbourne* [1973] AC 729). It cannot therefore amount to that other evidence itself. Thus the record of an information will only enhance the credibility of the witness and the absence of it cannot render the oral evidence of it inadmissible; nor can it be a substitute for the evidence that it is meant to corroborate.

It is therefore clear that there must be oral evidence of the information given. P51 cannot be a substitute for it. Accordingly, we hold that P51, the information supplied under s 27 by the appellant, is inadmissible.

Evidence of Subsequent Conduct

The inadmissibility of the information supplied by the appellant does not affect the admissibility of the evidence of her subsequent conduct under s 8 of the Evidence Act irrespective of s 27. As Chinnappa Reddy J said in *Prakash Chand v State* AIR SC 400 at p 404:

> The evidence of the circumstances, simpliciter, that an accused person led a police officer and pointed out the place where stolen articles or weapon which might have been used in the commission of the offence were found hidden, would be admissible as conduct, under s 8 of the Evidence Act, irrespective of whether any statement by the accused contemporaneously will or antecedent to such conduct falls within the purview of s 27 of the Evidence Act (vide *Himachal Pradesh Administration v Om Prakash* AIR 1972 SC 975.)

[53] Guided by the above the evidence as presented in the case before me reveal that pursuant to the information furnished by the accused the police party, led by (the suspect/the first accused) was brought to No 36, Lorong Air Putih Satu onto to the first floor where there is a room rented by the suspect. The first accused himself brought SP8 to an attached bathroom where there is a 'sinki' (wash basin). Underneath that an orange plastic was pointed by the first accused to SP8. Upon pointing out the plastic the first accused then also said 'wang ada dalam plastik it'. SP8 upon opening the plastic then found 48 pieces of RM100. A comparison was made of the serial number of the notes with a copy of the photostat copy he carried with him and SP8 found that the serial numbers of the notes tallied with the numbers found in the photostat list. A search list was also signed by the first accused and that constitutes acknowledgement that the money was indeed found (P20). P19 disclosed that the first accused had volunteered the information and SP8 and SP9 were cross-examined on his evidence. P21 is the report of SP8.

[54] I now turn to the evidence led against the second accused. When the second accused was arrested by SP8, 29 pieces of RM100 notes were taken from his trousers pocket and again the serial numbers tallied with the numbers found in the photostat copies of the notes made and furnished by SP10. The second accused was brought by SP7 to a shop that retails mobile phones from which a RM100 note was recovered. The money was paid for the purchase of a SIM card. The serial number AU 7875015 was positively identified and it was a note given by the second accused to the shopkeeper. That serial number also tallied with a number as identified in P9.

[55] The prosecution also relies on P28 (a report made by SP7 before taking the second accused to the beach) and P29 a report made after the visit to the beach. The contents of P28 and P29 have been referred to herein before.

[56] The intertwined evidence of SP8 and SP9 relate to the evidence of the knowledge of the first accused with regard to the whereabouts of the deceased. In the course of giving evidence SP9 referred to certain statements uttered by the first accused. It is borne out from perusal of the above evidence given by SP9 that he had commenced questioning the first accused. However what ensued is the statements made by the first accused consequential upon which SP8 and a team of police personnel brought the first accused to an area at a beach where the first accused indicated an area. Counsel for the first accused raised an objection to the portion of the evidence where according to SP9 stated 'semasa di kawasan dia menyatakan tempat itu adalah tempat Ah Bee ditanam'. It was this stage that counsel for the first accused raised an objection and vigorously maintained that a trial within a trial would be a more appropriate method as what was stated by the accused would then be his own version.

[57] In the course of the proceedings what was stated by the first accused to SP9 was in fact the earlier of two statements purported to be given. Nevertheless SP9 gave evidence only after SP8. In the evidence submitted there were certain statements made by the first accused to SP8 (P19) but that transpired *after* the visit to the beach and after statements were made to SP9 by the first accused (P26). This situation reflected the regrettably jumbled and disjointed manner in which the prosecution introduced the witnesses. The statements made by the first accused to SP9 led to the fact of the discovery of the body of the deceased whilst statements uttered by the first accused to SP8 led to the fact of certain amounts of RM100 notes being recovered.

[58] In both the instances where SP8 and SP9 were giving evidence counsel for the first accused had objected to the admissibility of the reports made by SP9 (P26) and SP8 (P19).

[59] Central to the evidence raised by the prosecution are the following issues to be considered:

(a) the objections by counsel for the second accused (and equally adopted by counsel for the first accused) that since there is a charge under the Kidnapping Act 1961 it has not been shown that s 16 of the Kidnapping Act 1961 has been administered;

(b) common intention has not been established and the evidence is only circumstantial;

(c) the police witnesses are interested witnesses. The question of the first and second accused understanding the language. The first accused speaks Mandarin while the second accused speaks in Hakka but is described to have understand the Cantonese dialect.

[60] I proposed to deal with these issues as follows. Section 16 of the Kidnapping Act 1961 provides:

16(1)

Where any person is charged with an offence under this Act any statement, whether such statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after such person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by such person to or in the hearing or any police officer not below the rank of Inspector, whether or not interpreted to him by any police officer or any other person concerned or not in the arrest, shall be admissible at his trial in evidence and, if such person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:

Provided that no such statement shall be admissible or used as aforesaid —

(a) if the making of the statement appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against such person, proceeding from a person in authority and sufficient in the opinion of the Court, to give such person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or

(b) in the case of a statement made by such person after his arrest unless the Court is satisfied that a caution was administered to him in the following words or words to the like effect:

> Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence.

A Provided that a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been given if it has been given as soon as possible.

(2) Notwithstanding anything to the contrary contained in any written law a person accused of an offence under this Act shall not be bound B to answer any questions relating to such offence after any such caution as aforesaid has been administered to him.

(3) Whenever a police officer has made up his mind to charge a person with an offence under this Act he shall first caution such person, in C the manner prescribed in subsections (1) and (2) before asking him any questions or any further questions as the case may be.

(4) For the purposes of this section 'offence under this Act' means —

(i) an offence punishable under subsection 3(1) or under section 5, 6 D or 10;

(ii) any of the offences referred to in subsection 3(2);

(iii) any conspiracy to commit, or an attempt to commit, or an abetment of, any of the offences specified in paragraphs (i) and (ii) E

[61] Section 113 of the Criminal Procedure Code differs essentially in the form of the words of caution. It provides:

F 113 Admission of statements in evidence

(1) Where any person is charged with any offence any statement, whether the statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after the person is charged and whether in the course of a police investigation or not and whether or G not wholly or partly in answer to questions, by that person to or in the hearing of any police officer of or above the rank of Inspector and whether or not interpreted to him by another police officer or other person shall be admissible in evidence at his trial and, if the person charged tenders himself as a witness, any such statement may be used H in cross-examination and for the purpose of impeaching his credit:

Provided that —

(a) no such statement shall be admissible or used as aforesaid —

I (i) if the making of the statement appears to the Court to have been caused by any inducement, threat or promise having reference to the charge proceeding from a person in authority and sufficient in the opinion of the Court to give the person charged grounds which would appear to him reasonable for

supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or

(ii) in the case of a statement made by the person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words to the like effect:

> It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence; and

(b) a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been administered if it has been administered as soon as possible.

(2) Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which subsection (1) applies shall not be bound to answer any questions relating to the case after any such caution as aforesaid has been administered to him.

[62] There are indeed differences between the two provisions. There are other similar statutory provisions to the admissibility of statements found in the Dangerous Drugs Act 1952, the Anti-Corruptions Act 1992 and the Internal Security Act 1960. It is clear here that the issue of non-compliance with s 16 of the Kidnapping Act 1961 is grounded on an endeavour to vitiate the admissibility of P19, P26 as indicated above. I find the argument on the issue cannot be sustained for two reasons.

[63] Firstly, the prosecution has refused to produce the cautioned statements for that is the ultimate object of the defence case insisting that a trial within a trial should be conducted. Since no trial within a trial is conducted the question of establishing voluntariness which is also predicated on a caution being administered is not material to the facts as presented by the prosecution. It is not relevant to consider s 16 in the circumstances of this case. I have hitherto referred to the analysis found in *Francis Antonysamy*'s case on the application of s 27 of the Evidence Act 1950. In this respect there is again a further clarification in *Krishna Rao a/l Gurumurthi v Public Prosecutor and another appeal* [2009] 3 MLJ 643; [2009] 2 CLJ 603, Richard Malanjum CJ (Sabah and Sarawak) in delivering the judgment of the Federal Court elucidated the issue further (at p 655 (MLJ); p 618 (CLJ)):

> [31] It should be borne in mind that the hurdles to overcome for the admission of cautioned statement and for discovery statement are

A quite distinct. The former demands voluntariness at the time of making it and that there should be absence of any form of oppression, inducement, threat or promise to the maker. The latter does not require those prerequisites save that the court has the discretion to exclude it on the ground that its prejudicial effect outweighed its B probative value (see *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507; [1999] 1 CLJ 829; *Kesavan a/l Petchayo @ Balakrishnan v Public Prosecutor* [2003] 2 MLJ 209; [2003] 1 CLJ 846) ...

[32] ...

C [33] ...

[34] ...

[35] Further, in the case of *Public Prosecutor v Kalaiselvan* [2001] 2 MLJ 157; [2001] 1 LNS 24 Augustine Paul J (as he then was) said this:

D

> It is settled law that evidence adduced in a trial within a trial cannot be used against the accused in the main trial. Thus as Meares J said in *Ex parte Whitelock Re Mackenzie* [1971] 2 NSWLR 534 the voir dire is entirely separate from the trial proper. Wells J in *R v Williams* (1976) 14 E SASR, made the observation that the voir dire ... stands apart from the usual and regular conduct of a criminal trial... (at p 2). In *R v Bradshaw* (1978) 18 SASR 83, King J expressed the view that the voir dire hearing is not part of the trial proper. In *R v Bannerman* (1966) 48 CR 110, Miller CJM accepted that the voir dire must be kept separate from the trial itself. In *Chua Poh Kiat Anthony v Public Prosecutor* [1998] 2 SLR 713 and *Lim* F *Seng Chuan v Public Prosecutor* [1977] 1 MLJ 171, it was held that the fundamental principle of the administration of justice is that a voir dire ought to be considered a separate or collateral proceeding.

G **[64]** Further to this a reference is also to be made to the same case *Krishna Rao a/l Gurumurthi & Anor v Public Prosecutor & another appeal* [2007] 4 CLJ 643 at the stage of the Court of Appeal where Gopal Sri Ram (now FCJ) stated (at p 662):

H [24] The way in which s 27 of the Evidence Act 1950 should be approached has been fairly worked out in the many decided cases that have discussed it. There are so many that it is neither feasible nor desirable to discuss them all here. But the common thread that runs through all of them is clear enough. It is that the section — like so I many other areas in the law of evidence — rests on the twin pillars of reliability and accuracy. Accordingly, the first question that a court must ask itself is this: Did the accused ever make a discovery statement? This turns on the credibility of the policeman who gives evidence of the discovery statement. If the court is satisfied that the

first question must be answered in the negative, that is to say, that the alleged statement is a fabrication, then that is the end of the matter and no further steps in the inquiry are necessary. But if the court decides that the first question should receive an affirmative response, then it must ask itself the second question. Is the version of the discovery statement put forward by the policeman giving evidence of it accurate enough to be acted upon? If the accuracy of the statement is in doubt then it should be rejected. Otherwise it should be accepted.

[65] Again in *Krishna Rao a/l Gurumurthi*'s case Gopal Sri Ram (now FCJ) also referred to the former Federal Court decision in *Chong Soon Koy v Public Prosecutor* [1977] 2 MLJ 78 (at p 666) with regard to s 27 of the Evidence Act 1950.

[66] Secondly, on the issue of common intention the Federal Court in *Krishna Rao a/l Gurumurthi*'s case stated (per Richard Malanjum CJ (Sabah and Sarawak) at pp 662–663 (MLJ); pp 626–627 (CLJ)):

[60] It is settled law that s 34 is a rule of evidence and does not create a substantive offence. Simply put it is a statutory recognition to the common sense principle that if more than two persons intentionally do a thing jointly it is just the same as if each of them had done it individually. It is an embodiment of the concept of joint liability in doing the criminal act based on common intention. Hence, an accused person is made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all irrespective of the role he played in the perpetration of the offence. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act.

[61] The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. It has been said that as common intention essentially being a state of mind direct evidence as proof is difficult to procure. Invariably inferences have to be relied upon arising from such acts or conduct of the accused, the manner in which the accused arrived at the scene, the nature of injury caused by one or some of them or such other relevant circumstances available. Indeed the totality of the circumstances must be taken into consideration in arriving at a conclusion whether there was common intention to commit the offence for which the accused can be convicted. The facts and circumstances of each case may vary. As such each case has to be

A decided based on the facts involved. Whether an act is in furtherance of the common intention is an incident of fact and not of law.

[62] For a charge premised on common intention to succeed it is essential for the Prosecution to establish by evidence, direct or circumstantial, that there was a plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of s 34 notwithstanding that it was pre-arranged or on the spur of the moment provided that it must necessarily be before the commission of the offence.

[67] With regard to the issue of circumstantial evidence the decision of the Federal Court in *Krishna Rao a/l Gurumurthi*'s case is pertinent (per Richard Malanjum CJ (Sabah and Sarawak) at p 660 (MLJ); p 624 (CLJ)):

[53] There are several instructive judicial decisions on how circumstantial evidence should be dealt with in appropriate cases. The main principle distilled from those decisions is summarised thus:

> That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the convictions. That is very true. It must, however, be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner? (See: per Thomson CJ in *Chan Chwee Kong v Public Prosecutor* [1962] MLJ 307).

[68] Thirdly, the issue is also raised that the several police witnesses particularly SP8, SP9 and SP7 are interested witnesses and hence the court is to be vigilant about their evidence. The issue of police witnesses being interested witnesses was ventilated in *Public Prosecutor v Teh Cheng Poh* [1980] 1 MLJ 251 and considered by the learned trial judge. It is worthwhile for the purpose of this case to reproduce the passages in respect of which I wish to adopt:

> Counsel contended that it was therefore unsafe to rely only on the testimony of PW2. Mr Karpal Singh also referred to the following passage appearing on p 390 of the *Indian Quinquennial Digest 1971* — 1975 (Vol 3) concerning the credibility of a police witness:
>
> > Section 3 — Police witness — Credibility of. The mere circumstance that the witnesses were Police Employees may not be sufficient for doubting their veracity but when the accused was wanted by the Police in a murder case and

> when passing on a road he was apprehended and on search of his person was found to be in possession of a pistol, live cartridge etc., the official position of such police witnesses does demand strict scrutiny and corroboration of their statements. 1973(1) Chand LR 620

Section 3 referred to in the above passage is a reference to s 3 of the Indian Evidence Act (1872). I was not referred to the provisions of that section and, as far as I am aware, it is the interpretation clause of the said Act. Be that as it may, although I would agree that the evidence of any witness should of course be scrutinised with care, I would not, with respect, subscribe to any proposition that the evidence of a police witness must invariably be corroborated in the circumstances described in the above-mentioned passage. I would however, with respect, refer to and adopt the following dictum of Thomson CJ (as he then was) in the case of *Public Prosecutor v Mohamed Ali* when His Lordship said as follows:

> When a police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If he says he saw a cow jumping over the moon his evidence is, of course, not to be accepted, but if he says he saw a cow wandering along one of the main streets of Kuala Lumpur (the sort of thing we all see every day of our lives) there is not the slightest justification for refusing to believe him. Of course if his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent improbability the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted.

Here I would reiterate that I had, of course without undue emphasis on demeanour alone, after seeing and hearing PW2 in the witness box, found him to be a witness of truth and had accepted his testimony as reliable. I also considered that he was not an interested witness but was only a public officer who was only performing his duties and merely related to the court what he actually saw and did on that day. His evidence was not contradicted by other evidence nor was he shaken in cross-examination and I also found that there was nothing inherently improbable about his evidence which was given on oath. Even if PW2 was an interested witness there is no legal presumption that he should not be believed unless there are cogent reasons for disbelief in the light of evidence to the contrary and the surrounding circumstances (*Balasingam v Public Prosecutor*). There were no such cogent reasons or evidence to the contrary and the surrounding circumstances in this case do not show that PW2 should be disbelieved.

[69] In this case before me counsel for the first accused would want me to believe that the several police officers SP7, SP8 and SP9 who tendered evidence would therefore necessarily have to be disbelieved. I do not agree for the same approach explained in *Teh Cheng Poh*'s case. The police officers as public officers would be interested to solve the case but this does not necessarily render this evidence colourable.

[70] Yet another aspect of this issue is that the several statements made to SP7 and SP9 were translated. On this issue I find the statement of Suffian LP (as he then was) in delivering the judgment of the Federal Court in *Tan Too Kia v Public Prosecutor* [1980] 2 MLJ 187 illuminating. This was a case where defence counsel Mr Karpal Singh in that case had submitted as a second issue that the appellant in that case whose mother tongue was Teo Chew did not quite understand the language (Hokkien) used by the Inspector. Suffian LP in response to this stated:

> In view of our conclusion on Mr Karpal Singh's first contention, it is unnecessary for us to say anything about his second, for anything we say on it would be obiter. Nevertheless, we would observe that generally speaking it is desirable that a suspect be interrogated in a language in which he is at home; but we would not go further by saying that if his mother tongue is Teochew he must be interrogated only in Teochew, and that if he is not, his statement is necessarily inadmissible. To do so would unnecessarily tie up the hands of the police in remote parts of the country, such as Ulu Kelantan or Upper Perak. This is a multi-racial and multi-lingual country, and we cannot shut our eyes to the fact that many Malaysians have not one, but two, mother tongues, and while they are master of no particular language, yet converse easily in several languages for every day purposes. This is especially so among the Chinese, for many of them understand at least two Chinese dialects. What is important is that a person interrogated should understand the language used by the interrogator. In most cases a suspect is not being asked about concepts and abstract ideas, to express which he needs to be questioned and to speak in a language he is most at home in; but about events and concrete things. About these he may be questioned and is expected to give his own version only in language of the kind ordinarily used in the bazaar.

[71] The above reasoning is adopted here. At the conclusion of the case for the prosecution, there is to be found cumulative circumstantial evidence with strands linking the two accused person. The strongest of the inferences is the fact of the possession of notes (cash) found in the person of the second accused and found on account of the information given by the first accused. For this reason I find it to appropriate to refer the statement of LP Thean JA in *Tan Chuan Ten & Anor v Public Prosecutor* [1997] 2 SLR 348 at p 357:

> The evidence adduced was wholly circumstantial and the question revolves on what inferences the court can draw from the primary evidence. A reasonable inference is one which, on looking at the totality of the evidence, one can say that there is a reasonable degree of probability, not just a mere possibility or a strong suspicion, that fact which the court infers did occur. Such an inference does not have to be the only inference that the court can reasonably draw from the evidence. There may another or other inferences which the court can reasonably draw and one of them may be relied upon to establish a prima facie case.

[72] The link or common veil is the ransom money recovered and the

reliance on the statements uttered by the first and second accused separately to the police witnesses. As expressed at the outset there is an overlap of evidence that suggests that although this is not a case of a single transaction yet the events have transpired in juxtaposition such that they are closely interconnected. I therefore ruled that a prima facie case has been established in respect of both the charges, and called upon the first and second accused to enter their defences and both opted to give their defence under oath.

THE DEFENCE

[73] The first accused Wong Thean Fah gave his evidence under oath. He stated at the outset that on 25 April 2004 he was interviewed for a post at Restoran Mexica Hotel Green Last, Jalan Air Putih and commenced work there on 30 April 2004. On 26 April 2004 he occupied premises described as 'asrama Mexica Restaurant' (hostel) which is situate behind the restaurant itself. Prior to that he has been working at another restaurant.

[74] His introductory evidence indicates that upon commencing work at Mexica Restaurant Green Last, his working hours were between 10.30–2.30pm, 5.00pm–10.30pm. He admits to having borrowed the motorcycle from Shim Chee Kang before 3 May 2004 but states that he returned it early in April. His description of his arrests differed from SP16 in that he alleged that he was brought to the restaurant in a car. SP16 had distinctly stated that before the arrest of the first accused, he and the police party saw the first accused and Shim Chee Kang approaching a motorcycle. In other words there was no suggestion of a motorcar. It is clear that the examination in chief of DW1 comprises a version that is contrary to the evidence presented by the prosecution. However it includes allegations of having been beaten by the police even at the time of arrest, a fact which was not at all put to SP16 in cross-examination. His allegation that several police resorted to several physical measures of torture also included an allegation he was brought to the asrama (hostel) where a search was purportedly made but nothing was found. This part of the evidence is clearly intended to negate SP19 for in his examination in chief it would appear that the first accused's version is that after the visit to the beach he was brought to the hostel again and it was the police who brought down the parcel as found in the following:

Q: Selepas memandang (pointing) saya dibawa ke kereta polis.

A: Betul. Lepas itu Tuan Mohd Jumaat bawa saya ke Restoran Mexica. Di belakang asrama itu Tuan Mohd Noor dan seorang polis turun dan masuk dalam asrama. Tidak lama mereka bawa satu bungkusan. Mereka tidak tunjuk bungkusan itu kepada saya. Saya tidak ingat warna bungkusan itu. Selepas itu saya dibawa ke Balai Polis Kuantan. Di balai polis saya ada ditanya soalan.

Q: Siapa.

A: Tuan Krishnan dan Koh Ah Tiam. Krishnan minta saya mengaku dan sekali lagi saya minta jumpa ahli keluarga dan minta mereka lantik peguam. Krishnan kata jika kamu mengaku saya akan membenarkan kamu jumpa ahli keluarga.

Q: Apa pengakuan yang diminta.

A: Dia suruh saya mengaku saya yang tanamkan mayat di pantai. Dia mengugut saya jika tidak mengaku tetapi bukti telah ada.

[75] The above is an example of his denials either in examination in chief or during cross-examination. This could be discerned when the deputy public prosecutor posed questions as follows:

Q: Adakah kamu mengatakan 'Ah Bee sudah mati dan ditanam di pantai'.

A: Itu ada diberitahu.

Q: This question was repeated.

A: *Saya tidak beritahu Insp. Koh Ah Tiam ayat tersebut.*

...

Sejak hari pertama ditahan dan siasat ada bekerjasama dengan polis: Tak setuju tidak kerjasama.

Put

Sebenarnya awak kerjasama yang baik:

Tak setuju.

Put

Dalam tempoh awak ditahan polis tidak pernah pukul atau mendera:

Tak setuju.

Ada seorang pegawai siasat ASP Koh Ah Tiam. Semasa soal siasat ada pegawai lain:

Tiada.

Put

Semasa siasat oleh ASP Koh dia tidak pernah pukul atau ugut:

Tidak benar.

Berapa lama disiasat ASP Koh:

Masa tak ingat tetapi sekejap dan tak pasti.

Apa alamat 36 Lorong Air Putih alamat siapa:

Saya tak tahu.

P21 dirujuk, kandungan diterangkan.

Put

Rumah No. 36 Lorong Air Putih ialah rumah sewa. Awak bawa polis dan menunjukkan tempat wang:

Tidak setuju.

P20 dirujuk.

Itu memang no. kad pengenalan. Itu bukan tandatangan saya.

(Emphasis added.)

[76] Two other witnesses gave evidence after the first accused. DW1 (2) is a chemist. He was questioned on whether finger prints were found on the spade found at the beach or on the nylon rope and his reply was 'urusan cap jari bukan procedure yang dilakukan oleh Jabatan Kimia'. The entirety of the report of the chemist as found in P42 is not of any value to the prosecution's case or the defence and is found to be neutral. The third person to give evidence for DW1 is his sister. In her evidence she stated, inter alia, that sometime in 1997 she went overseas and spent six years in the United States. To a question posed by the deputy public prosecutor her response is that she went to the United States in 2001. Her evidence purported to give some explanation that she has sent money to the first accused having earned money through working in restaurants and getting tips. Her explanation is found to be very general and did not furnish any credible explanation for the money found in the premises occupied by the first accused.

[77] The evidence of the second accused is focused on his version with regard to the RM2900 found in his trouser's pocket and his statement to SP7. His evidence on the RM2900 is as follows:

Q: Semasa diperiksa ada polis jumpa apa.

A: Polis telah jumpa RM2900 di poket seluar sebelah kanan.

Q: Ada polis bawa kamu ke tempat kamu tinggal untuk diperiksa.

A: Ada pada hari yang sama.

Q: Polis ada periksa bilik kamu.

A: Saya tak tahu sebab saya menunggu di luar dalam kenderaan polis.

Q: Tadi dikatakan polis ada jumpa RM2900. Mana dapat duit itu?

A: Wang tersebut dipulangkan oleh seorang bookie jumlah RM3000

Q: Bila.

A: Lebih kurang 2 hari sebelum saya ditangkap.

Q: Kenapa diberi duit itu.

A: Wang itu adalah duit pertaruhan yang dimenang oleh saya. Duit itu duit yang diterima setelah menang (won the bets). *Nama bookie Ah Wit. Nama sebenar Ah Wit. Umurnya dalam lingkungan 28 atau 29 tahun. Dia tinggal di Air Putih.*

Q: Di mana awak buat betting.

A: Di restoran tempat saya kerja. Bookie akan datang ke restoran untuk ambil pertaruhan. Ia datang 2 atau 3 kali dalam seminggu. Ada kerja-pekerja lain di restoran itu. Apabila jumpa duit itu ada polis tanya di mana duit itu didapati dan saya telah menjawab duit itu adalah dimenangi.

Q: Ada bila-bila masa polis bagi tahu duit itu duit ransom dari kes culik.

A: Tidak.

Q: Ada bila masa kemudian, polis beritahu duit itu adalah wang ransom.

A: Ada. Saya terkejut.

Q: Ada polis bawa cari Ah Wit.

A: Tidak ada.

Q: Mana RM100 lagi dari RM3000 yang diberi oleh bookie.

A: 100 saya gunakan untuk beli telephone card.

Q: Ada kamu disoal siasat oleh polis bernama ASP Sampornak dan anggota polis lain.

A: Ada tetapi saya tak tahu nama.

Q: Ada seorang Cina nama Mr Ooi.

A: Ya.

Q: Mereka suruh kamu menggunakan loghat apa.

A: Saya disoal dalam Bahasa Malaysia tetapi saya tidak faham.

Q: Ada diterjemahkan oleh Mr Ooi.

A: Sebelum itu tidak. Tetapi selepas itu Mr Ooi diminta membantu ambil statement saya.

Q: Mr Ooi soal dalam loghat Cantonese.

A: Saya kurang faham apa yang dia cakap dalam loghat Cantonese.

Q: Semasa disoal ada tidak kamu beritahu ASP Sampornak itu Ah Bee ada tanam di pantai.

A: Tidak.

Q: Ada tidak pada masa itu ASP Sampornak beri amaran seperti yang dicatatkan dalam report itu.

A: *Ada. Saya faham setelah diterangkan oleh seorang Cina Cantonese itu tetapi saya tak cakap 'Ah Bee ada tanam di pantai'.*

Q: Ada bila-bila masa ASP Sampornak bawa awak ke pantai.

A: Ada.

Q: Pada masa dibawa adakah kamu digari?

A: Tangan digari ke belakang dan mata diikat dengan kain (blind folded).

Q: Bila.

A: Sebelum naik kenderaan di Balai Polis.

Q: Bila kamu dibuka.

A: Apabila tiba di pantai.

Q: Dalam kenderaan ada berapa orang.

A: Tak tahu.

Q: Pantai ini di mana.

A: Saya tidak tahu.

Q: Apabila kain dibuka apa kamu lihat.

A: Saya nampak satu kumpulan polis di suatu tempat yang jauh. Lepas itu saya dibawa ke sana. Saya tak kenal dia dan saya tahu nama. Jaraknya saya tak tahu. Ada ramai polis di sana dan juga ramai orang sana. Saya juga nampak Ah Kit (OKT 1) bersama polis. Semasa itu saya masih digari. Saya nampak suatu mayat di tepi lubang. Saya tak cam mayat itu.

Q: Apabila turun dari kenderaan ada beritahu polis itu tempat Ah Bee ditanam.

A: Tidak.

Q: Dan apabila sampai di tempat di mana ramai polis, mayat sudah ada di tepi lubang. Adakah kamu yang tanam mayat itu.

A: Tidak.

Q: Adakah kamu yang bawa polis ke tempat pantai dari balai polis.

[78] In cross-examination there were further references to Ah Wit as follows:

Kamu kata duit itu diberi Ah Wit:

Ya.

Bila kamu serah duit kepada Ah Wit untuk wang pertaruhan:

Saya tak ingat tetapi saya ada buat pertaruhan dengan rakan sekerja iaitu *Ah Cheong, Ah Chun*.

Mereka bekerja dengan kamu:

Ya.

Wang yang diserah berapa banyak:

Saya buat pertaruhan RM100. Kalau menang tambah 5 kali. Ini untuk perjudian bola sepak. Saya tak ingat kawan saya yang buat. Nama Ah Soah, Ah Chen.

A *Bila Ah Wit serah duit*:

2 hari sebelum saya ditangkap.

Apa tujuan bawa duit setelah diserah dan apa buat dibawa ke kedai kopi: Itu wang kemenangan dan saya simpan. Duit pendapatan RM1000 sebulan saya tidak
B masuk dalam akaun bank. Sepanjang kerja saya tidak pernah buka akaun bank.

Put

Sebenar wang yang dijumpa dalam poket adalah wang tebusan dan bukan wang yang dikatakan diberi oleh Ah Wit:

C Tak setuju.

...

Semasa soal siasat kamu tidak beritahu pasal Ah Wit kepada polis:

Saya tidak beritahu.

D (Emphasis added.)

[79] It is pertinent to recall what SP8 stated as evidence during the cross-examination of SP8, he was posed with certain questions and it is
E necessary to reproduce it to indicate to what extent the prosecution witness is questioned about Ah Wit, a person whose name is being mentioned the first time at defence stage. The relevant portion is:

Sebelum tangkapan ada buat risikan mengenai latar belakang OKT?

F Saya tidak ada maklumat mengenai kegemaran beliau meletak bet bagi English Premier League.

OKT 2 tidak memaklumkan duit itu adalah hutang yang telah diserahkan balik.

G **[80]** There was no mention then to Ah Wit. The second witness for the second accused is his cousin. She merely gave general information about his hours of work. Her evidence is also an endeavour to explain that he would always be home after 1am. The most relevant portion of her evidence (during cross-examination) is the part which can be regarded as an attempt to
H corroborate the second accused's evidence that the money is obtained from Ah Wit which is as follows:

Bila jumpa Chan selepas tangkapan:

8 minggu selepas itu sebab polis kata dia akan didakwa dan dia akan dibawa ke
I mahkamah.

Ada beritahu kenapa dia didakwa:

Chan kata wang dijumpa dalam poket dan wang itu adalah wang tebusan. Dia kata dia terkejut. Dia suruh saya cari Ah Wit. Saya pergi tempat kerja Chan (OKT 2) dan diberitahu Ah Wit sudah lama tidak datang ke restoran.

[81] It is found this particular place of evidence is self-serving and in view of the fact that it is supposed to have transpired eight weeks after his arrest its probative value is lacking.

[82] A separate evaluation is also required in respect of defences raised by the first and second accused to rebut the prosecutions case in view of the two charges.

[83] It is proposed to deal firstly with the charge under the Kidnapping Act 1961 against the first and second accused where there is little direct evidence and strands of circumstantial evidence.

[84] In *Ng Hoong Kee v Public Prosecutor* [1967] 1 MLJ 85 Azmi CJ (as he then was) referred to the statement of Murray-Ansley CJ in *Kartar Singh & Anor v Rex* [1952] MLJ 85 in the following terms:

As Murray-Ansley CJ in *Kartar Singh & Anor v Rex* says:

> Where there is direct evidence, however slight, the jury are entitled to accept ... In the case of circumstantial evidence the position is different. Here the evidence must be such that, if it is believed there is no reasonable alternative to the guilt of the accused. If it is anything less than this it is no case at all.

[85] In the case of the first accused the defence is mainly denial. For the reasons already given above his evidence that he did not understand what was said by SP9 lacks credibility. It is also observed that during his examination in chief and cross-examination he did not show lack of understanding of the questions although they were also conveniently translated to him. His denial that he did not sign the search list is an afterthought. Moreover it was not questioned at all during the cross-examination of SP8 that the money was retrieved and while no adverse inference against an accused person may be drawn by his failure, this fact of discovery of money could not be doubted.

[86] In *R v Burdett* (1820) 4 B & Ald 95 Best J (at p 121) observed:

> It has been said that there is to be no presumption in criminal cases. Nothing is so dangerous as stating general abstract principles. We are not to presume without proof. We are not to imagine guilt, where there is no evidence to raise the presumption. But when one or more things are proved from which our experience enables to ascertain that another, not proved, must have happened, we presume that it did happen, as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable evidence. It is enough if its existence be highly probable particularly if the opposite party has in his power to rebut it by evidence, and yet offers none, for then we have something like an admission that the presumption is just.

[87] The result of the search conducted led the police party to the first accused's hostel and where he indicated the location of the money. He led the police to the money based on his knowledge where the money is being kept.

[88] With regard to the second accused as stated above the name Ah Wit was mentioned during the defence stage. There were several other names mentioned by the second accused who are said to be involved in what appears to be an illegal betting related to the English Premier League.

[89] Here the second accused is merely asserting that Ah Wit is the mysterious identity whom the court is to believe is the conduit pipe through which he received the money that was paid as ransom.

[90] In this case the prosecution has submitted vigorously against introducing cautioned statements that may have been recorded. The defence however has made several requests for a trial within a trial to be convened. I have earlier ruled that the application to conduct the trial within a trial as premature. I am reminded of the statement of Suffian LP (as he then was) in *Husdi v Public Prosecutor* [1980] 2 MLJ 80 at p 82:

> We do not think that the prosecution should supply copies of the police statement direct to the defence without the intervention of the court — because of the peculiar circumstances prevailing in this country. Malaysia is a small country, with a small population, and Malaysians are easily scared; they are reluctant to be involved. If a crime is committed under their nose they look the other way, see, hear and say nothing, do little or nothing to help identify — let alone — arrest the offender, and yet complain that the police do not catch criminals and that courts are bedazzled by technicalities. If the prosecution is obliged to supply copies of police statements to the defence without the intervention of the court, the defence may be tempted to ask for, and the prosecution will be obliged to supply, copies of every statement in the police investigation file, and Malaysians will be more reluctant to come forward with evidence to incriminate their fellows.
>
> To sum up, the answer to the two questions as limited during the course of arguments is this — when a prosecution witness is being cross-examined, and the defence proposes to impeach his credit, the court, should, on the request of the defence, refer to his police statement and may then, if the court thinks it expedient in the interest of justice, direct the defence to be supplied with a copy.
>
> Our conclusion is not inconsistent with judgment of Syed Othman FCJ in *Husdi v Public Prosecutor*, out of which arises this reference, which dealt with the wider question whether or not the defence is entitled in advance of the trial to copies of police statements of prosecution witnesses, and which he answered in the negative, which answer was not challenged before us.

[91] In this context I would also refer to s 157 of the Evidence Act 1950

where an interpretation has been rendered in *Public Prosecutor v Dato Seri Anwar Ibrahim (No 3)* [1999] 2 MLJ 1. The judgment of Augustine Paul (now FCJ) indicates, inter alia:

> ... A police statement recorded under s 112 of the Criminal Procedure Code is absolutely privileged (see *Martin Rhienus v Sher Singh* [1949] MLJ 201; *Husdi v Public Prosecutor* [1979] 2 MLJ 304). However, the defence may have access to it for the purpose of impeaching the credit of a witness (see *Husdi v Public Prosecutor* [1980] 2 MLJ 80). It is made admissible in evidence by s 157 of the Evidence Act 1950 which reads as follows:
>
> > In order to corroborate the testimony of a witness, any former statement made by him whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.
>
> The words in the section '... or before any authority legally competent to investigate the fact ...' clearly refer to a police statement made in the course of a police investigation. I pause to add that the statement can be used under this section only to show consistency and not for purposes of corroboration (see *Aziz bin Muhamad Din v Public Prosecutor* [1996] 5 MLJ 473). As I said in an earlier part of the judgment, it should be used only when the testimony of the witness who made the statement has been challenged. I consider it necessary to make an observation on the application of the section in the light of the objection raised. The use of the words '... may be proved' in the section make the use of a former statement for the purpose of the section discretionary. Thus, the prosecuting may, if it so desires, waive the privilege attached to a police statement and use it for the purpose of the section. A failure to use it can never be fatal to the prosecution case as it would only be the prosecution which will suffer as a result of not using a prior consistent statement to bolster the credit of a witness which has been challenged. It will therefore cause no prejudice to the defence. On the contrary, it will be to its advantage. If the defence has a hunch that the statement is inconsistent with a witness's testimony in court, then an application should be made to impeach the credit of the witness by use of the statement. In any event, as a police statement is privileged, no adverse inference can be drawn from his non-production. This is based on the principle that the drawing of an adverse inference for the failure to produce a privileged document would be to destroy the privilege itself (see *Weston v Peary Mohan Dass* [1912] ILR 40 Cal 898, *Dulhin v Harnandan* AIR 1916 PC 157).

[92] In the final analysis I find that on a balance of probabilities the defence *has failed to rebut the prosecution's case on the charge relating to kidnapping* and consequentially the prosecution has established its case beyond reasonable doubt.

[93] I now turn to the charge preferred against the first and second accused under s 302 of the Penal Code.

A **[94]** The prosecution has relied substantially on the statements in P19, P28 to establish the prima facie case. Counsel for the first accused has also persistently maintained that evidence is lacking to establish common intention.

B **[95]** During the examination in chief of the first accused evidence was led that the first accused commenced work at Mexica Restaurant on 26 April 2004 with the hostel where he was accommodated being situate in the rear of Mexica Restaurant. His defence indicated his working hours on two shifts (that is 10.30am–2.30pm and 5pm–10.30pm). Between 27 April 2004 and C 29 April 2004 he stated that he worked at the restaurant to familiarise himself (menyesuaikan diri). According to SP1 the motorcycle was borrowed from Sim Chee Kang before 3 May 2004 and returned in early April.

D **[96]** The defence of the first accused is that he hardly knew the deceased and whatever statements made by him were extracted by force and physical torture. As already indicated above he even denied making the statement 'Ah Bee sudah mati dan ditanam di pantai'.

E **[97]** Emphasis of the defence was in fact laid on torture for purposes of the statements obtained. It is noted that no further information was elicited to afford further explanation of the first accused to affirm or negate the evidence by the prosecution in respect of the first accused for purposes of the charge under s 302 of the Penal Code. With regard to the second accused, the first accused in cross-examination by the deputy public prosecutor answered. F

Bila mengenali Chan Yoon Choy?

Pada November 2002. Saya kenal dia di tempat kerja dan saya tidak rapat.

Restoran Sri Pantai Jalan Air Putih.

G Put

Sebenarnya Chan Yoon Choy adalah sahabat baik:

Tidak setuju

Put

H Selepas 10 malam sebenarnya awak berjumpa dengan Chan Yoon Choy (OKT 2):

Tak setuju.

I **[98]** The first accused denied purchasing the nylon rope from the hardware shop, a fact that linked him to the deceased.

Put

Sebenarnya pada 26 April 2004 jam 5.30 kamu berada di kedai perkakas besi Syarikat Perkakas Besi Indah Jalan Beserah:

Saya tidak setuju.

P8 dirujuk.

Put

Pada 26 April 2004 di kedai hardware kamu beli tali nylon:

Tidak setuju.

[99] The second accused also denied that he made a statement about Ah Bee in examination in chief. The evidence comprised the following:

Q: Ada kamu disoal siasat oleh polis bernama ASP Sampornak dan anggota polis lain.

A: Ada tetapi saya tak tahu nama.

Q: Ada seorang Cina nama Mr Ooi.

A: Ya.

Q: Mereka suruh kamu menggunakan loghat apa.

A: Saya disoal dalam Bahasa Malaysia tetapi saya tidak faham.

Q: Ada diterjemahkan oleh Mr Ooi.

A: Sebelum itu tidak. Tetapi selepas itu Mr Ooi diminta membantu ambil statement saya.

Q: Mr Ooi soal dalam loghat Cantonese.

A: Saya kurang faham apa yang dia cakap dalam loghat cantonese.

Q: Semasa disoal ada tidak kamu beritahu ASP Sampornak itu Ah Bee ada tanam di pantai.

A: Tidak.

Q: *Ada tidak pada masa itu ASP Sampornak beri amaran seperti yang dicatatkan dalam report itu.*

A: *Ada. Saya faham setelah diterangkan oleh seorang Cina cantonese itu tetapi saya tak cakap 'Ah Bee ada tanam di pantai'.*

Q: Ada bila-bila masa ASP Sampornak bawa awak ke pantai.

A: Ada.

Q: Pada masa dibawa adakah kamu digari?

A: Tangan digari ke belakang dan mata diikat dengan kain (blind folded).

Q: Bila.

A: Sebelum naik kenderaan di Balai Polis.

Q: Bila kamu dibuka.

A: Apabila tiba di pantai.

Q: Dalam kenderaan ada berapa orang.

A: Tak tahu.

Q: Pantai ini di mana.

A: Saya tidak tahu.

Q: Apabila kain dibuka apa kamu lihat.

A: Saya nampak satu kumpulan polis di suatu tempat yang jauh. Lepas itu saya dibawa ke sana. Saya tak kenal dia dan saya tahu nama. Jaraknya saya tak tahu. Ada ramai polis di sana dan juga ramai orang sana. Saya juga nampak Ah Kit (OKT 1) bersama polis. Semasa itu saya masih digari. Saya nampak suatu mayat di tepi lubang. Saya tak cam mayat itu.

Q: Apabila turun dari kenderaan ada beritahu polis itu tempat Ah Bee ditanam.

A: Tidak.

Q: Dan apabila sampai di tempat di mana ramai polis, mayat sudah ada di tepi lubang. Adakah kamu yang tanam mayat itu.

A: Tidak.

Q: Adakah kamu yang bawa polis ke tempat pantai dari balai polis.

(Emphasis added.)

[100] The questions posed by the prosecution in cross-examination did little to shed further light on his association with the first accused as follows:

Cross-examination: En Razali

OKT 2 under same oath.

Bila mula kenal Ah Kit (OKT 1):

Semasa saya bekerja di Restoran Hoi Sang.

Berapa lama kenal sebelum ditangkap polis:

Lebih kurang 2 bulan.

Dalam 2 bulan selalu jumpa Ah Kit:

Tidak.

Put

Awak dan Ah Kit kawan baik:

Tak setuju.

Dalam 1 minggu berapa hari bekerja di Hoi Sang:

6 hari dalam 1 minggu.

Hari apa yang tak bekerja:

Hari cuti diberi secara optional. Tidak tentu kalau tak cukup wang saya tak bercuti.

Waktu kerja:

11–3.00. 5 petang sampai 12 malam.

Apa yang dilakukan antara 3–5 petang:

Saya balik rumah dan rehat.

Kalau tak rehat di rumah ke mana pergi:

Saya tak ada tempat saya balik.

[101] However the prosecution for first time and at the defence stage attempted what could be discerned as a totally fresh and further evidence as follows:

Put

Antara jam 3–5 ada jumpa OKT 1:

Tak setuju.

Selepas 12 malam apa yang dilakukan:

Saya balik rumah, mandi dan keluar untuk supper dan balik ke rumah untuk tidur. Saya biasa keluar dengan kakak sepupu saya.

Put

Kamu ada kawan iaitu OKT 1:

Tidak.

27.4.2004 jam 11.30 malam di mana kamu berada:

Saya sedang kerja.

27.4.2004 11.30 malam ada jumpa kawan:

Tiada.

Put

27.4.2004 jam 11.30 OKT 1 dan seorang nama Ah Bee ada datang jumpa kamu di restoran.

Tak setuju.

Di mana letak kedai coffee Sun Sun di Air Putih:

Ya.

Selalu pergi ke kedai kopi ini:

Tidak.

A Put

Pada 28.4.2004 jam 1 pagi awak ada pergi ke kedai Sun Sun:

Tidak setuju.

Put

B

Awak ke Sun Sun pada 28.4.2004 jam 1 pagi. Awak ke kedai Sun Sun untuk membeli minuman keras atas arahan OKT 1:

Tak setuju.

29.4.2004 jam antara 4.30–6.30 petang di mana kamu berada:

C

Saya berada di rumah.

Jadi kamu tak bekerja:

Itu hari Khamis dan saya cuti hari itu.

D Put

Sebenarnya pada tarikh itu kamu ada di Kedai Kopi Sun Sun:

Tak setuju.

Put

E

29.4.2004 antara 4.30pm – 6.30pm kamu di situ untuk beri maklumat kepada OKT 1 sama ada ibu Ah Bee datang berseorangan untuk memberi wang tebusan:

Tak setuju.

Bila tarikh awak ditangkap:

F

2.5.2004 di tempat kerja.

P15 dirujuk.

Saya tak tahu tempat ini.

G Put

Semasa ditangkap ada dapat duit 290 keping note RM100 yang diambil dari poket seluar:

Ya.

H

Put

Itu adalah wang tebusan diberi Wong Thean Fah:

Tak setuju.

I

[102] The second accused was also asked the following:

Semasa soal siasat kamu tidak beritahu pasal Ah Wit kepada polis:

Saya tidak beritahu.

Ooi ada bersama semasa soal siasat:

Ya.

Berapa lama dia ada bersama semasa soal siasat:

Lebih kurang 1 jam.

Adakah Ooi berkomunikasi dengan Encik Chan:

Ada.

Dalam dialect apa:

Saya cakap loghat Hakka dan Ooi cakap loghat cantonese.

P28

Berdasarkan report kamu ada beri maklumat di mana Ah Bee di tanam:

Tidak.

Awak telah dibawa ke pantai:

Ya.

Berapa orang mengiringi:

Saya tak tahu sebab mata saya diikat.

Bila dibuka?

Apabila tiba di pantai.

Semasa dibuka mata tidak ada lagi mayat dijumpa:

Tak setuju.

Berapa lama ada di pantai:

Tak ingat.

Awak di tepi pantai sekejap sahaja:

Tak setuju.

Put

Awak telah tunjuk di mana mayat di tunjuk:

Tak setuju.

28.4.2004 jam 2 pagi awak dan OKT 1 telah ambil dan bunuh seorang bernama Woo Chen Chew.

Tak setuju.

[103] The prosecution at the defence stage has posed questions which could be perceived as attempts to introduce further evidence to the relationship between the first and second accused. The process however

causes a level of inquiry the reasons for which are provided in the locus classicus of *Browne v Dunn* (1893) 6 R 67 (HL). Although *Browne v Dunn* rule stems from a civil case nevertheless the rules of cross-examination enunciated therein say that a cross-examiner cannot rely on evidence that is contradictory to the testimony of the witness without putting the evidence to the witness in order to allow the witness to justify the contradiction. Lord Herschell originally explained it as:

> I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.

[104] Hunt J in *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1 at p 16 observed:

> It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matter, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the inference sought to be drawn.

[105] Wells J in *Reid v Kerr* [1974] 9 SASR 367 at pp 373–374 explained the practical aspect:

> ... a judge (or a jury) is entitled to have presented to him (or them) issues of facts that are well and truly joined on the evidence; there is nothing more frustrating to a tribunal of fact than to be presented with two important bodies of evidence which are inherently opposed in substance but which, because *Browne v Dunn* has not been observed, have not been brought into direct opposition, and serenely pass one another like two trains in the night.

[106] Throughout the proceeding and before the defence was called no evidence was led by the prosecution to indicate when and where the first and

second accused could have conducted further acts to perpetrate the offence under s 302 of the Penal Code for which the first and second accused were charged. But from the questions posed to the second accused the prosecution evinced an intention to improve upon the case by suggesting that there are occasions when the first and second accused met. The prosecution it seems at this stage of the defence would be perceived to have withheld some information earlier on which are not explicable to the court.

[107] Section 180 of the Criminal Procedure Code and the Evidence Act 1950 (ss 137 and 138) have to be taken into account. The object of the examination in chief of the prosecution's witnesses is to get the witnesses to adduce all material facts relating to the charge under s 302 of the Penal Code. The prosecution's case in the proceedings however rests primarily on the statements made to their own witnesses. In P26 the first accused stated 'Itu Ah Bee sudah mati kita tanam di pantai'. In P28 the second accused stated 'Ah Bee ada tanam di pantai'.

[108] A difficult situation has however emerged during the defence stage, of the prosecution endeavouring to elucidate facts which were not brought forth when the prosecution's witnesses were giving evidence. These arise therefore gaps in the prosecution's case. The general denial of the first and second accused to the 'new' facts attempted to be introduced by the prosecution cannot amount to admissions as the first and second accused no longer have the opportunity to cross-examine the prosecution's witnesses. The 'cogent' evidence which the prosecution attempts to introduce at a defence stage is my view an attempt to fill in a lacuna. The defence on the other hand has not applied for any of the cautioned statements that may have been obtained as the prosecution has vociferously submitted that portions of the statements obtained from the first and second accused relating only to the discovery of certain facts as detailed above are adduced. This dependency on extracts or portions of the statements from the first and second accused is axiomatic of the observation in *Sia Soon Suan v Public Prosecutor* [1966] 1 MLJ 116 per Ong Hock Thye Ag CJ (Malaya) (as he then was) at p 118:

> We must accordingly exonerate all police ... as well as the public prosecutor's office from any sort of blame for the flaws which had developed in the prosecution's case. Nevertheless, the requirement of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether this court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else.

[109] In this case before me the charge is made pursuant to s 302 of the Penal Code. The prosecution has not given one jot of evidence in the true sense of the word to justify which limb of the provision of s 302 it relies on.

There is therefore a carte blanc charge under s 302. The cause of death has raised more questions in the light of the attempt by the prosecution to introduce 'fresh evidence'.

[110] It is therefore necessary to refer to certain statements in *Public Prosecutor v Liew Kim Choo* [1997] 3 SLR 699 per Yong Pung How CJ (p 714):

> The skeletal arguments submitted by the DPP raised one matter that I was compelled to consider, namely, where the facts in issue have not been proved by direct evidence, and the court is asked to infer those facts from circumstantial evidence, may the court infer that those facts in issue are proved if it thinks it more likely than not that those are the correct inferences or can the court only make such inferences if it is satisfied beyond a reasonable doubt that those inferences are proper?
>
> The DPP in his skeletal arguments highlighted my grounds of decision in the related MA 243/96 — this was the prosecutor's appeal against the trial judge's finding that there was no case to answer. It will be remembered that I allowed that appeal and concluded that a prima facie case was made out against the respondent. The DPP appeared to suggest that, since I had accepted his version of the facts in issue for the purposes of calling the defence, I should be like minded in deciding the issue of guilt.
>
> I did not agree with this. I was of the view that I was not in any way bound by my conclusions in MA 243/96 for those conclusions were not an adjudication of the respondent's guilt. As Lord Diplock stated in the leading case of *Haw Tua Tau v Public Prosecutor* [1981] 2 MLJ 49; [1980–1981] SLR 73:
>
> > For reasons that are inherent in the adversarial character of criminal trials under the common law system, it does not place upon the court a positive obligation to make up its mind at that stage of the proceedings whether the evidence adduced by the prosecution has by then already satisfied it beyond reasonable doubt that the accused is guilty. Indeed it would run counter to the concept of what is a fair trial under that system to require the court to do so.
>
> *The prosecution must, at the end of trial, go beyond what it must show at the close of the prosecution's case. At the close of the prosecution's case, the prosecution need only raise a prima facie case which, if uncontradicted by the defence, would justify a conviction*. That case could be made out of proved facts or reasonable inferences drawn from the proved facts. The nature of the inferences as to primary facts that must be drawn at the close of the prosecution's case were described by Lord Diplock in *Haw Tua Tau* as follows:
>
> > for the purpose of reaching the decision called for by s 189(1) the court must act on the presumptions (a) that all such evidence of primary fact is true, unless it is inherently so incredible that no reasonable person would accept it as being true; and (b) that there will be nothing to displace those inferences as to further facts or to the state of mind of the accused which would reasonably be drawn from the primary facts in the absence of any further explanation.

For obvious reasons, in deciding the issue of guilt at the close of the trial, this standard will not suffice. The evidence must be subjected to the highest, not lowest standard of scrutiny. The facts proved by the prosecution must therefore satisfy the trial judge beyond reasonable doubt that the correct inference to be drawn from those facts is that the accused person is guilty. The trial judge is not allowed to act on the presumption that the primary evidence is true. Nor is he to make only a minimal assessment — to decide if the necessary inferences 'would reasonably be drawn'. He must make a maximum assessment — to decide if he has no reasonable doubt that those are the correct inferences to make. In this regard I would refer to the dicta of LP Thean J, as he then was, in *Tan Siew Chay v Public Prosecutor* [1993] 2 SLR 14, where, having cited the same passage of Lord Diplock which I have quoted relating to s 189(1) he said:

> The application of limb (b) necessarily involves the court drawing inferences from the primary facts, and in drawing such inferences the court looks at the totality of the evidence and considers what inference, if any, that can reasonably be drawn therefrom. But in considering any inference to be drawn the court at this stage does not apply the test whether the evidence looked at in its totality would inevitably and inexorably lead to only one inference or inferences for establishing the essential elements of the charge.

[111] The sole purpose of citing the above propositions is to recall that a two tiered appraisal must be taken in respect of the prosecution's case firstly at the close of the case of the prosecution and secondly at the close of the trial. The questions posed to the two accused persons by the prosecution at the defence stage have entailed troubling questions to surface. As already elicited hereinbefore one example is the recall of SP7. Additionally the objections raised to a trial within a trial being conducted invite further questions why the defence could not have called the same police witnesses SP8, and SP7 and to make necessary applications to the court to produce statements recorded from both the accused, the first and second accused, or either.

[112] In the light of the attempt to introduce 'fresh' evidence at the stage of the case for the defence it cannot be said that the prosecution in respect of the charge pursuant to s 302 of the Penal Code has discharged its legal burden. Moreover the statements aside the conduct of either accused; the first and second accused; where they have purportedly appointed to the spot (as opposed to the area) cannot be taken as corroborative that they have acted in concert to cause the death of the deceased. I do not take into account photographs taken by the police team showing the first and second accused pointing to the body. The pointing was clearly done on the instructions of the police. Having further considered the evidence I find that the defence has raised a reasonable doubt in respect of the charge under s 302 of the Penal Code thereby entitling them to an acquittal.

[113] I feel compelled to add however that there is an unwarranted turn of events that has disrupted the smooth conduct of the case of the prosecution. There has occurred a change of hands in that three different prosecuting officers have prosecuted at different times. Although this is not unprecedented I venture to express dismay as this is a case involving kidnapping for money that has gone to say the least awry in that the victim is now deceased. In that sense there is a public duty to countenance continuity in order to ensure that the system of administration of justice is not thwarted by unexpected disruptions. Different persons have different approaches in handling cases. There is an effect in the conduct of the proceedings.

[114] In considering the sentence to be imposed with respect to the charge under s 3 of the Kidnapping Act it has been urged upon me by the deputy public prosecutor that since the victim is now deceased the sentence that would best serve public interest is to impose the death sentence. I am of the view that this is simplistic in approach. It is an open invitation to *lex talionis.* I refer to *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 per Hashim Yeop Sani J (as he then was):

> One of the main considerations in the assessment of sentence is of course the question of public interest. On this point I need only quote a passage from the judgment of Hilbery J in *Rex v Kenneth John Ball* (1951) 35 Cr App R 164 as follows:
>
> > In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.
>
> Presidents and magistrates are often inclined quite naturally to be over-sympathetic to the accused. This is a normal psychological reaction to the situation in which the lonely accused is seen facing an array of witnesses with authority. The mitigation submitted by a convicted person will also normally bring up problems of family hardship and the other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so

that the convicted person may not be further burdened with additional hardship. This in my view is a wrong approach. The correct approach is to strike a balance, as far as possible, between the interests of the public and the interests of the accused. Lord Goddard LCJ in *Rex v Grondkowski* [1946] 1 All ER 560 at p 561 offered some good advice when he said:

> The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners.

[115] The Legislator itself has deemed it appropriate to provide an alternative. I take into consideration that both the first and second accused do not have previous criminal records. Accordingly I exercised the discretion to impose a sentence of imprisonment for life for each and ten lashes each of whipping. The sentence of imprisonment is to take effect from the date of arrests.

Both accused sentenced to life imprisonment and ten lashes of whipping.

Reported by Kanesh Sundrum